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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT *and* APPENDIX

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QUESTION PRESENTED

On their face and as applied by the Minnesota Bureau of Mediation Services (BMS), the Minnesota Public Employment Relations Board (PERB), the District Court for Hennepin County, Minnesota, and the Supreme Court of Minnesota, do the original and amended "fair-share-fee" provisions[1] of the Minnesota Public Employment Labor Relations Act (PELRA)[2] violate the First and Fourteenth Amendments to the United States Constitution, in so far as these provisions license an exclusive representative[3] to collect fees from employees who are not members of the representative without proving:

1. what specific activities the representative performed under color of the "meet-and-negotiate" and "meet-and-confer" provisions of PELRA;[4]

2. which of these activities (a) came within the aforesaid "meet-and-negotiate" and "meet-and-confer" provisions, and (b) were constitutionally

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[1] Respectively, Minn. Stat. § 179.65, subd. 2, *as enacted in* 1973 Session Laws of Minnesota, ch. 635, § 10, *in* Appendix hereto (App.) at 129a; and Minn. Stat. 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2, *in* App. at 130a.

[2] Minn. Stat. §§ 179.61 *et seq.*

[3] Under PELRA, an "exclusive representative" is "an employee organization which has been designated by a majority of those votes cast in the appropriate unit and has been certified". Minn. Stat. § 179.63, subd. 6. An "employee organization" is "any union or organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment". Minn. Stat. § 179.63, subd. 5.

[4] Minn. Stat. §§ 179.63, subds. 15-16; 179.65, subds. 2, 4; 179.67; 179.69.

chargeable to non-member-employees under this Court's decision in *Abood v. Detroit Board of Education;*[8]

3. which of the identified activities statutorily and constitutionally chargeable to non-member-employees actually benefitted those employees:

4. what monetary costs the representative incurred by undertaking statutorily and constitutionally chargeable activities that demonstrably benefitted non-member-employees; and

5. what formula is proper for distributing those monetary costs among all employees in the bargaining-unit?

PARTIES TO THIS PROCEEDING

The caption of this case contains the names of all parties to the proceeding in the Supreme Court of Minnesota, the judgment of which Appellants request this Court to review.

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[8] 431 U.S. 209 (1977).

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STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

Marilyn Threlkeld and Daniel Hanka respectfully appeal from the judgment of the Supreme Court of Minnesota in *Threlkeld* v. *Robbinsdale Federation of Teachers, Local 872,* 316 N.W.2d 551 (Minn. 1982).

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota of which Appellants seek review is reported at 316

N.W.2d 551 (Minn. 1982), and reprinted in App. at 5a. The opinion of the District Court for Hennepin County, Minnesota, declaring both the original and amended "fair-share-fee" provisions of PELRA constitutional, which decision the Supreme Court of Minnesota affirmed, is unreported, and reprinted in App. at 11a. The decision of the PERB and the decisions of the BMS, which the latter judicial opinions sustained, are unreported, and reprinted in App. at 21a, 35a, and 43a, respectively.

An earlier decision of the District Court, declaring the original "fair-share-fee" statute unconstitutional, is reported at 90 L.R.R.M. 2702 (1975), and reprinted in App. at 91a. The opinion of the Supreme Court of Minnesota reversing that decision is reported at 307 Minn. 96, 239 N.W.2d 437 (1976), and reprinted at App. 73a. The opinion of this Court vacating the latter judgment of the Supreme Court of Minnesota is reported at 429 U.S. 880 (1976), and reprinted at App. 69a.

JURISDICTION

This is an appeal from a decision of the Supreme Court of Minnesota[6] which sustained the constitutionality of the original and amended "fair-share-fee" provisions of PELRA[7] under the First and Fourteenth Amendments to the United States Constitution. The Court denied rehearing and entered judgment on

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[6] 316 N.W.2d 551 (Minn. 1982), *in* App. at 5a.

[7] Respectively, Minn. Stat. § 179.65, subd. 2, *as enacted in* 1973 Session Laws of Minnesota, ch. 635, § 10, *in* App. at 129a; and Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2, *in* App. at 130a.

14 April 1982.[8] Appellants filed their notice of appeal in that Court on 14 May 1982.[9] This Court has appellate jurisdiction under 28 U.S.C. §§ 1257(2) and 2101 (c) (1976), and under Rules 10 and 12 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the constitutionality, under the First and Fourteenth Amendments to the United States Constitution, of the original and amended "fair-share-fee" provisions of PELRA, *Minnesota Statutes* § 179.65, subd. 2.[10]

STATEMENT OF THE FACTS

Appellee Robbinsdale Federation of Teachers (RFT) is the exclusive representative for separate bargaining-units of teachers and educational aides employed by Independent School District No. 281 (ISD), Robbinsdale, Minnesota. At all relevant times, Appellant Threlkeld was an educational aide, and Appellant Hanka a teacher, in those units; but neither was a member of the RFT.

I. Proceedings in the BMS under the original "fair-share-fee" provision.

In 1973, the Minnesota Legislature authorized exclusive representatives to collect from non-members

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[8] App. at 115a and 111a.

[9] *Id.* at 119a.

[10] The text of these constitutional and statutory provisions appears in *id.* at 129a-130a.

"fair-share fees" not to "exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures".[11] Prior to September, 1974, the RFT notified the ISD of "fair-share" assessments against educational aides, including Threlkeld; and accordingly, the ISD began deducting amounts from her salary for payment to the RFT. Neither the RFT nor the ISD gave Threlkeld prior notice or hearing as to the amount of the fees, or as to what "specific expenses incurred for services rendered" the assessments purportedly defrayed. In December, 1974, the RFT began assessing "fair-share fees" against non-member teachers, including Hanka. Although the RFT notified Hanka of the amount of the assessment, neither it nor the ISD provided him with a prior hearing on the fee's propriety.

Appellants then obtained a declaration of the unconstitutionality of the original "fair-share" provision under the Fourteenth Amendment to the United States Constitution in the District Court for Hennepin County, Minnesota.[12] The Supreme Court of Minnesota reversed.[13] This Court vacated the latter judgment, and remanded for further consideration in light of the amendment of the "fair-share" provision effective 1 April 1976.[14]

Appellants amended their complaint to challenge the constitutionality of both the original and amended

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[11] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1973 Session Laws of Minnesota, ch. 635, § 10, *in* App. at 129a.

[12] App. at 91a.

[13] *Id.* at 73a.

[14] *Id.* at 69a.

"fair-share" provisions. The District Court then referred the case to the BMS for administrative consideration of the *pre-* and *post-*1 April 1976 assessments. In anticipation of a hearing, Appellants unsuccessfully petitioned the BMS for discovery.[15]

At the hearing on the *pre-*1 April 1976 takings, Appellants testified that they had no information identifying any specific service the RFT allegedly performed on their behalf, citing the cost of any such service, explaining the relationship of any such service to negotiations and administration of grievance-procedures, or demonstrating any other basis for "fair-share" assessments.[16] Hanka testified, though, that the RFT's publications admitted it engaged in activities other than negotiations and grievance-adjustment.[17]

The RFT's only witnesses were its treasurer, C. Paradis, and executive director, B. Noack. Paradis disclaimed personal knowledge of the activities either of the RFT's own officials and staff-personnel,[18] or of its state- and national-level affiliates, the Minnesota Federation of Teachers (MFT) and the American Federation of Teachers (AFT), although both the MFT and AFT received a portion of Appellants' fees from the RFT.[19] Noack also conceded his unfamiliarity

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[15] *Id.* at 57a.

[16] Transcript of Hearing of Wednesday, 1 February 1978, before Hearing Officer Viola M. Kanatz, Minnesota Bureau of Mediation Services, at 19-20 (Threlkeld); 14, 17 (Hanka).

[17] *Id.* at 23.

[18] *Id.* at 69, 77-80.

[19] *Id.* at 80-81.

with the activities of the MFT and AFT,[20] has inability to identify any expenses they allegedly incurred rendering services to Appellants in negotiations and administration of grievance-procedures,[21] and his ignorance of records purporting to show such expenses.[22] In addition, both admitted that the RFT's exhibits identified no services allegedly rendered to Appellants,[23] demonstrated no relationship between any activity of the RFT and negotiations and grievance-adjustment,[24] tabulated no expenses the RFT purportedly incurred in those pursuits,[25] and did not show that the assessments against Appellants constituted a *pro rata* share of specific costs borne by the RFT under PELRA.[26]

Lacking evidence on these particulars, the RFT's witnesses interposed the so-called "residuum theory", explaining that the RFT subtracted from its regular membership-dues an amount alleged to represent the costs of "members-only benefits" (the benefits the RFT provides its members but withholds from non-member-employees in its bargaining-units), thereby

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[20] *Id.* at 105-09, 111-12.

[21] *Id.* at 106-07.

[22] *Id.* at 107.

[23] *Id.* at 62-63 (Paradis), 103 (Noack).

[24] *Id.* at 63 (Paradis), 103 (Noack).

[25] *Id.* at 63 (Paradis), 103 (Noack).

[26] *Id.* at 63-64 (Paradis), 104-05 (Noack).

leaving a "residuum" assessed against Appellants.[27] Paradis conceded, however, that the RFT's exhibits underestimated the total expenditures for "members-only benefits".[28] Moreover, he acknowledged that the RFT fixed Hanka's fee according to his "lane" and "step" position on the graduated salary-schedule the RFT and ISD negotiated, just as it varied the regular dues of its teacher-members—even though all teachers in the unit supposedly received the same services.[29]

Notwithstanding the RFT's failure to prove specific expenses incurred for services rendered in negotiations and administration of grievance-procedures, the BMS adopted the "residuum theory" and held that "the exclusive representative provided adequate documentation of the method utilized in arriving at the amount of the fair share fee assessment" and "has met its burden of proof by identifying and detailing the benefits available to members only".[30]

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[27] *Id.* at 38-50, 59-60, 62 (Paradis); 104 (Noack). According to Paradis and Noack, everything the RFT did, exclusive of "members-only benefits", somehow related to negotiations and grievance-adjustment under PELRA. *Id.* at 68 (Paradis), 103-04 (Noack). Neither explained what this relationship was in any specific instance, though. Noack even asserted the propriety of charging fees for services the RFT admittedly did not render: *viz.*, organizing-activities the benefits of which (if any) accrued uniquely to the RFT's rival organization, the National Education Association. *Id.* at 109.

[28] *Id.* at 81-86.

[29] *Id.* at 64-68, 86-87. Paradis admitted that the RFT had adopted this graduated-dues principle before enactment of the original "fair-share" provision. *Id.*. at 66.

[30] App. at 51a.

II. Proceedings in the BMS under the amended "fair-share-fee" provision.

Effective 1 April 1976, the Minnesota Legislature authorized exclusive representatives to collect from non-members "fair-share fees" "for services rendered by the * * * representative in an amount equal to the regular membership dues of the * * * representative, less the cost of benefits financed through the dues and available only to members of the * * * representative, but in no event shall the fee exceed 85 percent of the regular membership dues".[21] Prior to demanding fees from Appellants under color of this statute, the RFT notified them of the amounts of the assessments, but provided no information relating to any "services rendered" in negotiations and grievance-adjustment.

At the BMS hearings on these *post*-1 April 1976 takings, the RFT's sole witness was C. Paradis, at that time its former, not active, treasurer. According to his hearsay testimony,[22] the RFT fixed regular dues for its teacher-members at 1% of their annual salaries, and assessed "fair-share fees" for non-member-teachers at 85% of 1% of their annual salaries, according to each teacher's "lane" and "step" position on the ISD's salary-schedule negotiated for the previous fiscal year.[23] For educational aides, the RFT fixed dues

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[21] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2, *in* App. at 130a.

[22] *See* Transcript of Hearing of Monday, 20 November 1978, before Hearing Officer Kenneth I. Tri, Minnesota Bureau of Mediation Services, at 33-34, 41-43, 44-45.

[23] *Id.* at 46-48, 49-50. Thus, a non-member-teacher's position on the salary-schedule was the sole criterion the RFT employed to set his fee in the first instance. *Id.* at 47.

and assessed fees at "flat rates".[34] Then, using a proposed budget of expected expenditures,[35] the RFT unilaterally labelled certain items "members-only benefits",[36] and reduced each non-member-employee's "fair-share fee" by multiplying the amount of membership-dues the non-member would have paid had he or she been an RFT member by the ratio of the amount budgeted for "members-only benefits" to the sum of all budgeted amounts.[37] The RFT then included in its assessments against Appellants MFT and AFT *"per capita* taxes" as directed by those organizations,[38] and added to its assessment against Hanka an AFL-CIO *"per capita* tax" requested by that organization.[39] At no time, however, did the RFT demonstrate its actual expenditures (if any) as exclusive representative in Appellants' bargaining-units,[40] although it claimed to have records of such expenditures.[41] Neither did it

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[34] *Id.* at 48-49, 50-51.

[35] *Id.* at 39-40, 52-53. *See* Transcript of Hearing of Wednesday, 6 December 1978, before Hearing Officer Kenneth I. Tri, Minnesota Bureau of Mediation Services, at 4.

[36] *See* Transcript, *ante* note 32, at 19, 32-33, 51-52.

[37] *Id.* at 20-31, 51-54; Transcript, *ante* note 35, at 6-11. If the fee covered a period of less than 12 months, the RFT reduced it proportionately. Transcript, *ante* note 32, at 52-54; Transcript, *ante* note 35, at 6-8.

[38] Transcript, *ante* note 32, at 33-34, 44-45; Transcript, *ante* note 35, at 8-10.

[39] Transcript, *ante* note 32, at 33-34, 44-45; Transcript, *ante* note 35, at 10.

[40] Transcript, *ante* note 32, at 39-40, 43-44; Transcript, *ante* note 35, at 7-8.

[41] Transcript, *ante* note 32, at 44, 55-56.

describe any service the MFT, AFT, or AFL-CIO provided Appellants.

Once again, however, notwithstanding the RFT's failure to produce such evidence, the BMS applied the "residuum theory" and held Appellants' challenges to be "without merit".[42]

III. Appeal of the BMS's rulings to the PERB, the District Court, and the Supreme Court of Minnesota.

Appellants appealed both the *pre-* and *post-*1 April 1976 "fair-share-fee" assessments to the PERB, which sustained the BMS's determinations in all respects.[43] On appeal from that decision, the District Court held that "[t]he residuum theory does not seem unreasonable", and that there was "no constitutional infirmity in the * * * statute or the administrative proceedings taken in this matter".[44] Then, on appeal from the District Court's decision, the Supreme Court of Minnesota affirmed, reinstating its earlier opinion "with respect to this case as it existed prior to the 1976 amendment [of PELRA]", and further concluding that "the amended statute affords to appellants substantial first and fourteenth amendment rights that the original statute did not".[45]

Appellants now seek review of this judgment.

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[42] App. at 38a.

[43] *Id.* at 21a.

[44] Id. at 17a.

[45] *Id.* at 7a.

SUBSTANTIALITY OF THE QUESTION PRESENTED

If permitted to stand, the judgment of the Supreme Court of Minnesota will license exclusive representatives under PELRA to extract "fair-share fees" from dissenting public employees, without proof that these fees constitute reasonable charges for beneficial services the representatives provided the employees in negotiations and the administration of grievance-procedures. So interpreted, PELRA will enable these representatives to violate dissenting employees' First- and Fourteenth- Amendment liberties, by exercising an irresponsible power of "private taxation" uncontrolled by even the most rudimentary principles of procedural due process, and ultimately unrelated to any legitimate purpose the payment of "fair-share fees" might serve. That such a result raises substantial constitutional problems needs no special emphasis.

I. The method of calculating "fair-share fees" under PELRA does not rationally relate to the purpose the fees ostensibly serve.

Both conceptually and constitutionally,[46] a "fair-share fee" is a legislative device, in the nature of *quantum meruit*,[47] to reimburse an exclusive repre-

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[46] On the constitutional necessity that "fair-share fees" accurately measure the costs of an exclusive representative's services to the employees charged, *see post*, pp. 15-19.

[47] *See, e.g.*, White Cloud Educ. Ass'n v. Board of Educ., 101 Mich. App. 309, 320-21, 300 N.W.2d 551, 555-56 (1980) (Kelly, J., concurring). Importantly, the Michigan "fair-share" statute involved in the latter case is the same one this Court earlier sustained as constitutional in *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

sentative for providing beneficial services in negotiations and the administration of grievance-procedures to employees in its bargaining-unit who choose to remain non-members of the representative—and so both this Court and the Supreme Court of Minnesota have explicitly recognized.[9] A legitimate "fair-share" statute, therefore, must rationally relate any fees charged non-member-employees to the costs of such services.

This Court has also repeatedly held that a legislature may declare proof of one fact *prima facie* evidence of another fact, *if* there is a rational connexion between the proof and the inference, and *if* the presumption is not conclusive.[10] However, basic tenets of due process outlaw any "permanent and irrebuttable presumption * * *, when that presumption is not necessarily true in fact, and when the State has reasonable alternative means of making the crucial determina-

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[9] *"Fair-share" statutes link fees to costs of beneficial services: see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977) (opinion of Stewart, J.); Oil, Chemical & Atomic Workers v. Mobil Oil Corp., 426 U.S. 407, 415 (1976); NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); IAM v. Street, 367 U.S. 740, 761 (opinion of the Court), 776 (Douglas, J., separate opinion) (1961); Railway Employes' Dep't v. Hanson, 351 U.S. 225, 235, 238 (1956); Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, Local 872, 307 Minn. 96, 105, 239 N.W.2d 437, 439, *vacated on other grounds sub nom.* Threlkeld v. Local 872, Teachers, 429 U.S. 880 (1976).

"Fair-share" statutes link fees to costs of negotiations and grievance-administration: see Abood, *ante*, 431 U.S. at 221, 225-26, 232 (opinion of Stewart, J.); Oil, Chemical & Atomic Workers, *ante*, 426 U.S. at 416; Street, *ante*, 367 U.S. at 768-69; Hanson, *ante*, 351 U.S. at 235; Robbinsdale Educ. Ass'n, *ante*, 307 Minn. at 98, 105, 239 N.W.2d at 439, 443.

[10] *E.g.*, Manley v. Georgia, 279 U.S. 1, 5-6 (1929); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 18-19 (1931).

tion".[30] A legitimate "fair-share" statute, therefore, must eschew such presumptions.

As applied below, PELRA's original and amended "fair-share" provisions do *not* rationally relate the fees the RFT charged Appellants to the costs of its beneficial services in negotiations and grievance-administration. Rather, the provisions adopt the "residuum theory", based on a patently non-rational, irrebuttable presumption. The "residuum theory" presumes that *every penny* the RFT expended on *unidentified* activities other than "members-only benefits" exclusively defrayed the cost of permissible services. However, common experience repels the notions that, "members-only benefits" aside, every service an exclusive representative provides to all employees in its unit specifically relates to negotiations and grievance-adjustment,[31] or that every service so related necessarily benefits each employee.[32] The literature on public-sector unionism supports this common-sense judgment.[33] And the record here contains no contrary evidence.[34] Moreover, the "residuum theory" makes

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[30] Vlandis v. Kline, 412 U.S. 441, 452 (1973). *Accord*, Board of Educ. v. LaFleur, 414 U.S. 632, 643-46 (1974); Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973) (presumption must not be "often contrary to fact").

[31] *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 n.35 (1977) (opinion of Stewart, J.). *See id.* at 231, 234, 236 (opinion of Stewart, J.); 242-43 (opinion of Rehnquist, J.); 256-57 (opinion of Powell, J.) (commenting on political nature and activities of exclusive representatives in public-sector employment).

[32] *See* Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Publi Policy* (Am. Enterprise Inst. 1958), at 47.

[33] *See, e.g.*, Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978).

[34] Regarding both the *pre-* and *post-*1 April 1976 assessments, the RFT's testimony and exhibits contained no explanation of the

this non-rational presumption irrebuttable. Dissenting employees who challenge "fair-share" assessments can attack the representative's calculation only by disproving the costs of "members-only benefits" the representative identifies, or establishing the existence of other such benefits the representative does not disclose—without, however, even minimal discovery of the representative's activities or expenditures. Furthermore, they have no opportunity to prove that unidentified services charged to them are unrelated to negotiations and grievance-administration or that, if such a relation exists, the services did not benefit them.

Thus, the "residuum theory" violates the Due Process Clause of the Fourteenth Amendment, because it embodies the presumption, obviously *not* "necessarily or universally true in fact",[35] and "often contrary to fact",[36] that *every* representative under PELRA, in *every* case, *always* expends *all* its income other than the costs of "members-only benefits" on beneficial negotiations and grievance-administration. And it denies *any* challenger, in *any* case, *no matter what his proofs may be, any* opportunity to attack the formula: "'Fair-share fee' *equals* regular membership-dues *minus* costs of 'members-only benefits', to a maximum of 85% of dues."

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relationship (if any) between its undisclosed activities and negotiations and grievance-adjustment, no designation of activities that allegedly provided Threlkeld and Hanka with services in those areas, no list of expenses it incurred performing such services, and no showing that the fees it demanded constituted a *pro rata* share of those expenses only. *See ante*, pp. 3-10.

[35] Vlandis v. Kline, 412 U.S. 441, 452 (1973).

[36] Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

II. The method of calculating "fair-share fees" under PELRA licenses exclusive representatives to abridge dissenting employees' First- and Fourteenth-Amendment freedoms through exercise of a private power of "taxation".

Abood v. *Detroit Board of Education* held that compulsory "agency-shop" contributions to an exclusive representative constitute a form of association with that organization,[87] and that the latter's use of such "fair-share fees" to finance activities other than negotiations and grievance-administration is an *absolute* violation of the First- and Fourteenth-Amendment rights of dissenting employees.[88] *Abood* also assigned to the representative the burden of proving its expenditures devoted to negotiations and grievance-adjustment[89]—a burden consistent with the general rules of evidence,[90] and the specific requirements of the First

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[87] 431 U.S. 209, 234-36 (1977) (opinion of Stewart, J.).

[88] *Id.* at 254 (opinion of Powell, J.): "The Court today holds that compelling an employee to finance a union's ideological activities unrelated to collective bargaining violates the First Amendment regardless of any asserted governmental justification."

[89] *Id.* at 239 n.40, 241 (opinion of Stewart, J.) (proper procedure must remove from dissenters "the considerable burden of monitoring all of the numerous and shifting expenditures made by the [representative] that are unrelated to its duties" in that capacity). *See* BRAC v. Allen, 373 U.S. 113, 118 (1963) ("impracticable" to require employees to prove representative's expenditures). *Accord,* Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, Local 872, 307 Minn. 96, 107, 239 N.W.2d 437, 444 (1976) (representative "must bear the ultimate burden of proving the fee's validity").

[90] A party with peculiar knowledge of, or special access to, the facts should be required to prove them. *E.g.,* Campbell v. United

Amendment.[41] And other decisions establish that, where First-Amendment liberties are at stake, only clear and convincing evidence suffices to carry the burden of proof.[42]

Here, however, the RFT adduced *no evidence whatsoever* of expenditures devoted to negotiations and grievance-administration, relying instead on the "residuum theory" to substitute a non-rational presumption for the facts withheld. Thus, its "fair-share"

States, 365 U.S. 85, 96 (1961); United States v. New York, N.H. & H.R.R., 355 U.S. 253, 256 n.5 (1957); Selma, R. & D.R.R. v. United States, 139 U.S. 560, 566-68 (1891); Rustad v. Great Northern Ry., 122 Minn. 453, 456-57, 142 N.W. 727, 728 (1931). This principle is particularly applicable here, in light of the refusal of the BMS to permit Appellants discovery of the RFT's activities. App. at 57a.

[41] *E.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. Princess Anne County, 393 U.S. 175, 181 (1968); DeGregory v. Attorney General, 383 U.S. 825, 829 (1966); Freedman v. Maryland, 380 U.S. 51, 57 (1965); Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539, 546-58 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). This Court explained the rationale for the burden in Speiser v. Randall, 357 U.S. 513, 520-26, 528-29 (1958).

[42] *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82-83 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964); Bruns v. Pomerleau, 319 F. Supp. 58, 66 (D. Md. 1970). *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276-77 (1971).

assessments necessarily abridged Appellants' First-Amendment rights.[43]

Moreover, under both the Fifth and Fourteenth Amendments, no legislature may delegate the power of taxation to private groups,[44] or use that power for their exclusive benefit.[45] A "fair-share fee" is necessarily invalid, then, unless it is clearly distinguishable from a tax.

National Cable Television Association, Inc. v. *United States* distinguished a "tax" from a "fee" on the

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[43] *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 112-15 (1943); Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941); Baldwin v. Redwood City, 540 F.2d 1360, 1371-72 (9th Cir. 1976); Wendling v. City of Duluth, 495 F. Supp. 1380, 1384-85 (D. Minn. 1980); Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696, 704-06 (M.D. Fla. 1978); Chester Branch, NAACP v. City of Chester, 253 F. Supp. 707, 712-14 (E.D. Pa. 1966).

[44] *Compare* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937), *with* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935), *and* Carter v. Carter Coal Co., 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936). *And cf.* Yakus v. United States, 321 U.S. 414, 423-24 (1944); Rice v. Chicago Bd. of Trade, 331 U.S. 247, 253-54 & n.4 (1947); Fahey v. Mallonee, 332 U.S. 245, 249 (1947); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in the result); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3 (1971) (Brennan, J., dissenting).

[45] *E.g.*, Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-65 (1874); Cole v. City of La Grange, 113 U.S. 1, 6-7 (1885); City of Parkersburg v. Brown, 106 U.S. 487, 500-01 (1882); Jones v. City of Portland, 245 U.S. 217, 221 (1917). *See* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896) (order of administrative board); Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 77-80 (1937) (order of state regulatory commission).

ground that a "fee" is assessed for a service "which * * * bestows a benefit on the [payer], not shared by other members of society", and acknowledged that a statute permitting the Federal Communications Commission to charge broadcasters for services performed on their behalf would be unconstitutional if it licensed the agency to assess them "not only for benefits they received" but also for other of its activities unrelated to them.[66] To avoid constitutional problems, the Court construed the statutory phrase "value to the recipient [of the agency's services]" to connote "benefit", and to constitute "the measure of the authorized fee".[67] *National Cable Television Association* thus re-emphasized that an assessment unrelated to any special benefit the payer receives from an agency's services is an unconstitutional "tax"[68]—and so the lower federal

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[66] 415 U.S. 336, 340-42 (1974).

[67] *Id.* at 341, 342-43. *Accord*, FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974). *Contrast* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521-23 (1937); New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 584-87 (1938).

[68] Other decisions of this Court before and after *National Cable Television Association* have relied on this constitutional dichotomy between "fees" and "taxes". Webb's Fabulous Pharmacies, Inc. v. Beckwith, —— U.S. ——, ——, 101 S. Ct. 446, 451-52 (1980); Union Brokerage Co. v. Jensen, 322 U.S. 202, 210-11 (1944); New Mexico *ex rel.* E. J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38, 55 (1906); Patapsco Guano Co. v. North Carolina Bd. of Agriculture, 171 U.S. 345, 350-54 (1898); Morgan's Steamship Co. v. Board of Health, 118 U.S. 455, 461-62 (1886). *Accord*, Northern States Power Co. v. Donovan, 258 Minn. 125, 127-28, 103 N.W.2d 126, 128 (1960); State v. Bartles Oil Co., 132 Minn. 138, 141-43, 155 N.W. 1035, 1037 (1916); Willis v. Standard Oil Co., 50 Minn. 290, 297-98, 52 N.W. 652, 654 (1892); State *ex rel.* Davidson v. Gorman, 40 Minn. 232, 233-35, 41 N.W. 948, 949-50 (1889).

courts have applied that decision.[69] Self-evidently, this principle applies even more insistently to assessments of private organizations such as the RFT than it does to those of governmental agencies.

Here, however, the RFT neither specified any services it allegedly performed for Appellants in, nor explained the relationship of any of its activities to, negotiations and grievance-adjustment. It identified no benefits Appellants received. It detailed no costs. And it demonstrated no connexion between its assessments and any such costs. Absent such evidence, Appellants' "fair-share fees" necessarily constitute private "taxes" extracted under color of PELRA in violation of the Fourteenth Amendment.[70]

III. The method of collecting "fair-share fees" under PELRA lacks even the most rudimentary attributes of procedural due process.

This Court has established that, even if First-Amendment freedoms are not involved, a seizure of

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[69] *E.g.*, Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 227-28 (5th Cir. 1979); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1128-30 (D.C. Cir. 1976).

[70] *Compare and contrast* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 343 (1974); FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 229-30, 231 n.17, 232 & n.20 (5th Cir. 1979); National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1100, 1104-05, 1107-08 (D.C. Cir. 1976); Electronic Industries Ass'n, Consumer Electronics Group v. FCC, 554 F.2d 1109, 1115-17 (D.C. Cir. 1976); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1133 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1137-38 (D.C. Cir. 1976); Public Service Co. of Colorado v. Andrus, 433 F. Supp. 144, 153, 155 (D. Colo. 1977).

property under color of statute without a prior hearing is unconstitutional under the Due Process Clause of the Fourteenth Amendment where: (i) no extraordinary circumstances compel immediate action to protect a substantial governmental interest; (ii) no state official (in particular, a judge) preliminarily reviews the bases of the creditor's claim, or evaluates the need for a *pre*-hearing seizure; (iii) no statutory provision requires the creditor to establish the probable validity of his claim, to make a convincing factual showing, or even to present some evidence beyond mere assertions, conclusory allegations, or hearsay; (iv) no mandate exists for an early hearing; (v) no safeguards protect against abuse of the system by self-interested parties seeking private gain; (vi) the creditor has no current, legal interest in the property seized; (vii) the necessary proofs involve a variety of complex matters, with possibly critical reliance on the credibility of witnesses; (viii) the party whose property is seized lacks access to the evidence; and (ix) the applicable statute denies award of damages or attorneys' fees in the case of a wrongful seizure."

Here, PELRA's procedure for collection of "fair-share fees" suffers all these deficiencies. First, the record evidences no extraordinary circumstances justifying immediate seizures to protect a substantial governmental interest. Second, PELRA designated no

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[11] Sniadach v. Family Finance Corp., 395 U.S. 337, 338-39 (opinion of the Court), 343 (Harlan, J., concurring) (1969); Fuentes v. Shevin, 407 U.S. 67, 73-78, 80-83, 87-93 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 604-07, 609, 614-18 (opinion of the Court), 625 (Powell, J., concurring) (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607-08 (1975); Mathews v. Eldridge, 424 U.S. 319, 325-26, 343-46 (1976).

governmental official to determine, under narrowly drawn standards, that *pre*-hearing seizures were necessary—rather, it left assessments to the caprice of the RFT, a private, self-interested organization. Third, PELRA did not require the RFT to establish the probable validity of its demands prior to seizures. Indeed, as applied by the BMS, the PERB, and the Minnesota courts, PELRA privileged the RFT to prevail on the ultimate issue with "evidence" consisting solely of mere assertions, conclusory statements, and hearsay regarding the irrelevant question of "members-only benefits". Fourth, PELRA mandated no hearing, as a matter of course.[12] Fifth, rather than establishing safeguards against abuse by self-interested exclusive representatives seeking private gain, PELRA adopted the non-rational "residuum theory", thereby ensuring the likelihood of misrepresentation and fraud in "fair-share" collections. Sixth, PELRA licensed the RFT to cause the sequestration of Appellants' monies before demonstrating any legal interest of its own therein. Seventh, although the amended version of PELRA speaks simple-mindedly of "membership dues" and "the costs of benefits financed through the dues and available only to members" as the only elements of

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[12] To be sure, hearings were held in this case—but only *after* the seizures, and because "[a] challenge by an employee • • • aggrieved by the assessment [was] filed in writing with the [BMS]". Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2, *in* App. at 130a. No one conversant with Appellants' experiences before the BMS and the PERB could seriously expect, though, that many such challenges will arise from dissenters unable to spend tens of thousands of dollars and years of their lives litigating the validity of fees that amount to one hundred or so dollars *per annum*. In most instances, practical realities guarantee that no hearings at all will take place.

proof in "fair-share" hearings,[73] the real constitutional issues are more complex.[74] Eighth, through application of the "residuum theory", PELRA placed the burden of proof on Appellants, even though they lacked reasonable access to evidence regarding the RFT's internal operations, and had no opportunity for discovery under Minnesota law.[75] Ninth and last, PELRA provides Appellants with no compensation for wrongful seizures of their wages, even if they establish fraud in the premises, thereby discouraging all employees without substantial incomes from asserting challenges at all.

Under these circumstances, PELRA's "fair-share" scheme self-evidently offends the Fourteenth Amendment.

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[73] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2, *in* App. at 130a.

[74] Difficult legal and factual conundrums surround the determination of what services an exclusive representative provides dissenting employees in negotiations and grievance-administration, whether those services benefit those employees, and what the direct and indirect costs of such beneficial services are. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (opinion of Stewart, J.) (question of what activities come within permissible range of negotiations and grievance-adjustment is "hazy"), *with* Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Public Policy* (Am. Enterprise Inst. 1958), at 47 (question of "benefits" exclusive representatives provide to dissenting employees is complex), *and with* IAM v. Street, 367 U.S. 740, 780 (opinion of Whittaker, J.), 795-96 (opinion of Black, J.) (1961) (extensive accounting-problems involved in isolating representative's costs of negotiations and grievance-administration).

[75] *See* Determination on *Pre*-hearing Discovery of the Minnesota Bureau of Mediation Services (11 January 1978), *in* App. at 57a.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of Threlkeld's and Hanka's appeal.

Respectfully submitted,

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1 July 1982

APPENDIX

OPINION OF THE SUPREME COURT OF MINNESOTA UPON RENDERING THE JUDGMENT TO BE REVIEWED IN THIS APPEAL, 5 MARCH 1982

316 N.W.2d 551 (Minn. 1982)

HENNEPIN COUNTY KELLEY, J.

Endorsed
Filed March 5, 1982
John McCarthy, Clerk
Minnesota Supreme Court

MARILYNN THRELKELD, ET AL., *Appellants,*

v. 81-683

THE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO, *Respondent,*

STATE OF MINNESOTA, intervenor, *Respondent,*

PUBLIC EMPLOYMENT RELATIONS BOARD, intervenor, *Respondent.*

SYLLABUS

Prior opinion, which held that fair share fee statute, Minn. Stat. § 179.65, subd. 2, is constitutional on its face and as applied, is reinstated.

Prior opinion, which held that fair share fee statute, Minn. Stat. § 179.65, subd. 2, does not violate constitutional standards of procedural due process, is reinstated.

Affirmed.

Considered and decided by the court en banc without oral argument.

OPINION

KELLEY, Justice.

This is an appeal from a May 6, 1981, order of the Hennepin County [2] District Court affirming an order of the Public Employment Relations Board dated December 6, 1979, determining that appellant, a non-member of the

Robbinsdale Federation of Teachers, Local 872, was legally assessed "fair share fees," pursuant to Minn. Stat. § 179.65. We affirm.

The facts and background of this litigation are set forth in *Robbinsdale Education Association v. Robbinsdale Federation of Teachers, Local 872*, 307 Minn. 96, 239 N.W. 2d 437 (1976). Following that decision, appellant appealed to the United States Supreme Court. Before that appeal was decided, the Minnesota legislature amended Minn. Stat. § 179.65, subd. 2. The United States Supreme Court then "vacated and remanded" the decision in *Robbinsdale Education Association* "for further consideration in light of Chapter 102 of the 1976 Session Laws of Minnesota." *Threlkeld v. Robbinsdale Federation of Teachers*, 429 U.S. 880 (1976). We then remanded the case to the district court "for further proceedings." Thereafter, hearings were held before the Bureau of Mediation Services and the Public Employment Relations Board, which, by its December 6, 1979, order, affirmed the validity and amount of the "fair share fee" assessed against appellant. The Hennepin County District Court affirmed the Public Employment Relations Board, holding that on its face and as applied to this appellant, the original statute, Minn. Stat. § 179.65, subd. 2, and its 1976 amendment, did not violate the first or fourteenth amendment to the United States Constitution.

In *Robbinsdale Education Association*, we held that the financial stability of exclusive representatives was of such importance as to override the need to determine the "fair share" fee's validity *prior* to its imposition. We likewise there indicated that non-bargaining unit members [3] had certain remedies to protect their rights. Finally, we invited the attention of the legislature to the question of providing a resolution of the problem.[1] Since that decision

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[1] Apparently in response to that invitation, the legislature did amend the statute by enacting 1976 Minn. Laws, ch. 102, § 2. This amendment, unlike the predecessor statute which we held in *Rob-*

was "vacated" by the United States Supreme Court, it presently is without force or effect. *In re Estate of Hallbom*, 189 Minn. 383, 249 N.W. 417 (1933).

We have now reviewed our prior opinion in *Robbinsdale Education Association*. We herewith reinstate it with respect to this case as it existed prior to the 1976 amendment. Moreover, we have concluded the amended statute affords to appellants substantial first and fourteenth amendment rights that the original statute did not. Accordingly, we affirm the trial court.

Affirmed.

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binsdale Education Association comported with constitutional due process concepts, did provide for advance written notice of the amount of the proposed "fair share fee assessment" and for a hearing subsequent thereto before any fees deducted are transmitted to the union.

ORDER OF THE DISTRICT COURT FOR HENNEPIN COUNTY, MINNESOTA, AFFIRMING THE DECISION OF THE MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD, 6 MAY 1981

(unreported)

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File 710101

MARILYN THRELKELD and DANIEL HANKA, *Plaintiffs*,

vs.

THE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO, *Defendant*,

and

STATE OF MINNESOTA, and PUBLIC EMPLOYMENT RELATIONS BOARD, *Interveners*.

ORDER

Nature of Case:

Action to determine the validity of fair share withholdings made from plaintiff employees of the Robbinsdale School District pursuant to Minn. St. § 179.65, subd. 2 as in force and effect before April 1, 1976 and as amended and in force and effect after April 1, 1976.

Nature of Proceeding:

A review of the determination made by the Public Employment Relations Board of the State of Minnesota in upholding decisions of the Bureau of Mediation Services affirming the fair share determination of the Robbinsdale Federation made with respect to pre-April 1, 1976 wages and post-April 1, 1976 wages.

Appearances:

Darel F. Swenson, Esq., for plaintiffs.

Roger A. Peterson, Esq., for
Robbinsdale Federation of Teachers.

[2] Brad P. Engdahl, Esq.,
Special Assistant Attorney General,
for the Public Relations Board.

Barbara Lindsey Sims,
Special Assistant Attorney General,
for the State of Minnesota.

Gregg M. Corwin, Esq., for Amicus Curiae
AFSCME Minnesota Councils.

DISCUSSION

History of Case.

This action when originally commenced challenged the validity of Minn. St. § 179.65, subd. 2 (1974). The statute purported to authorize the exclusive representative in collective bargaining for public employees to withhold from employees who were not members of the union sums representing a fair share of the costs of collective bargaining, the administration of the contract, and grievance procedures.

By an order dated August 13, 1975, this Court held that the statute violated the due process provisions of the State and Federal Constitutions. The Minnesota Supreme Court reversed this Court's order in *Robbinsdale Education Association v. Robbinsdale Federation of Teachers,* 307 Minn. 96, 230 N.W. 2d 437 (1976). The defendants appealed, and the United States Supreme Court vacated the Minnesota Supreme Court's judgment of reversal and remanded the case to the Minnesota Supreme Court for further consideration in light of Minn. Laws 1976, c. 102. 429 U.S. 880 (1976).

[3] Upon remand to it, the Minnesota Supreme Court then further remanded the case to this Court "for further proceedings including the consideration of such motions as may be made by the parties for amendments of the pleadings on file herein and for determination and such legal and factual issues as may be required in light of the order of the United States Supreme Court . . . and the pleadings herein, together with such amendments as may be allowed by the said district court."

After remand to this Court, the case was further referred, at the suggestion of counsel for all parties, to the Minnesota Bureau of Mediation Services for proceedings provided in Minn. Laws 1976, c. 102. By the order of reference, however, this Court retained jurisdiction pending exhaustion of the administrative remedy.

BMS made a fair share determination dated November 3, 1978 affecting fair share assessments made between July 1, 1974 and March 30, 1976. It also made a second order upholding fair share assessments made by the exclusive representative after April 1, 1976. In a decision dated December 6, 1979, the Public Employment Relations Board of the State of Minnesota affirmed both BMS orders. The cases are now returned to this Court for further proceedings.

Scope of Review.

Scope of review would seem to depend upon the affect of the United States Supreme Court's order vacating the judgment of the Minnesota Supreme Court remanding the case for further proceedings and also upon the order of the Minnesota Supreme Court remanding the case to this Court. Although this Court continues to believe that Minn. St. § 179.65, subd. 2 (1974) fails to make adequate provision [4] for notice of hearing and hearing to an aggrieved public employee, it seems unlikely that the Minnesota Supreme Court upon reconsideration is going to change its mind, particularly when the appropriate administrative

agencies subsequently followed an adequate notice and review procedure provided by legislative amendment to the fair-share statute. Therefore, for purposes of this review, the undersigned assumes that the Minnesota Supreme Court will reinstate its earlier decision vacated by the United States Supreme Court. Moreover, it appears that appellants have been given notice and an opportunity for hearing that meet existing standards of procedural due process as they relate to matters of this kind. *See Abood v. Detroit Board of Education*, 431 U.S. 209, and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

What remains to be considered is whether the notice given by Robbinsdale Federation in the hearing provided before BMS with respect to both the pre-April 1, 1976 and the post-April 1, 1976 fair share assessments comply with statutory standards and whether the fair share withholding statute as amended by Minn. Laws 1976, c. 102, as reflected in Minn. St. § 179.65, subd. 2 (1976), satisfies procedural due process requirements.

Pre-April 1, 1976 Fair Share Assessment Procedures.

Fair share withholdings made before April 1, 1976, Minn. St. § 179.65, subd. 2 (1974) provide in part:

[5] • • • [A]ll public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

The Minnesota Supreme Court held that the quoted statute passes constitutional muster. Certainly, *Abood v. Detroit Board of Education*, supra, upholds the assessment of fair-share fees to finance expenditures for collective bargaining, contract administration, and grievance procedures. And *Mathews v. Eldridge*, supra, suggests that because a hearing to determine the validity of the taking of property is not held before the actual taking occurs may not render the taking unconstitutional. As applied to this case, that would seem to mean that, as the Minnesota Supreme Court has held, it might not be necessary to satisfy the requirements of procedural due process to hold a hearing to determine the validity of statutorily enforced wage withholdings before the withholdings are made. This Court, therefore, must hold that the procedure followed by the Robbinsdale Federation with respect to giving notice and setting a hearing before the BMS complies with the statute as it has been interpreted by the Minnesota Supreme Court.

Post-April 1, 1976 Fair Share Assessment Procedures.

In 1976, the legislature amended Minn. St. § 179.65, subd. 2 to provide in part:

[6] • • • All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person

> aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative, within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. • • •

In addition to the statute, the BMS has adopted rules approved by PERB regulating the procedures to be followed in fair share fee litigation. The procedure provided by the legislature with respect to all fair share fee withholdings made after April 1, 1976 meets the requirements of procedural due process as established by the Minnesota Supreme Court in its earlier opinion in this matter.

Hearing Procedures Followed by BMS With Respect To All Fair Share Assessments.

A review of the records made available to this Court indicates that plaintiffs received adequate notice and opportunity to challenge the Robbinsdale Federation specification of members-only benefits not to be included in the fair-share fee. That review does not persuade this Court that the BMS and PERB were incorrect in ruling that the Federation sustained its burden of proving that the fair share fee met the statutory requirement of not [7] exceeding 85 percent of the regular membership dues and of representing an amount equal to the regular membership dues of the exclusive representative less the costs of benefits financed through dues and available only to members of the exclusive representative.

It is true that the administrative agencies applied the so-called "residuum theory" defined by the Hawaii Public Employees Relation Board as the proper measure to use for determining a fair share of collective bargaining costs. That definition provides that negotiation and administering

an agreement "encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and 'tooling up' process related to a negotiating contract and administering the same after its consummation. It virtually amounts to a residuum of the union's total activities after the 'union membership benefits' have been isolated and removed. . . ." Decision No. 72, 1976.

The residuum theory does not seem unreasonable. Indeed, any other view of the meaning of the quoted statue [*sic*] would seem unfairly restrictive. The record indicates that the administrative agencies correctly found that the Robbinsdale Federation sustained its burden of proof under that theory.

No error can be predicated on the refusal of the hearing agency to allow pretrial discovery. There is no provision for it in the Administrative Procedure Act, Minn. St. c. 15, or in the Minnesota Rules of Civil Procedure. Moreover, a reading of the record indicates that the [8] Federation apparently gave plaintiffs' counsel everything he requested either preceding the hearing or at the time of the hearing.

Finally, this Court can find no constitutional infirmity in the amended statute or the administrative proceedings taken in this matter with respect to determining the fair shares to be paid by plaintiffs and persons similarly situated with respect to assessments made after April 1, 1976.

Accordingly, the order of the Public Relations Board dated December 6, 1979 should be affirmed.

ORDER

The order of Minnesota Public Relations Board dated December 6, 1979 is affirmed.

BY THE COURT:
/s/ Crane Winton
Judge of District Court

Dated: May 6, 1981

OPINION OF THE MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD SUSTAINING THE "FAIR-SHARE" DETERMINATIONS OF THE MINNESOTA BUREAU OF MEDIATION SERVICES, 6 DECEMBER 1979

(unreported)

STATE OF MINNESOTA
PUBLIC EMPLOYMENT RELATIONS BOARD
Room 598 Space Center Building
444 Lafayette Road
Saint Paul 55101
Phone: 612-296-8947

IN THE MATTER OF:

Marilyn Threlkeld and Daniel Hanka
and
Robbinsdale Federation of Teachers Local 872,
Robbinsdale, Minnesota
and
Independent School District No. 281,
Robbinsdale, Minnesota

CASE Nos. 78-FSC-380-A and 78-FSC-382-A;
78-FSC-379-A and 78-FSC-381-A

This is a consolidated appeal from decisions of the Director of the Bureau of Mediation Services (hereinafter "Director") sustaining both the pre-April 1, 1976, and the post-April 1, 1976, fair share fees assessed Marilyn Threlkeld and Daniel Hanka (hereinafter "Challengers") by the Robbinsdale Federation of Teachers Local 872 (hereinafter "RFT").

I. Procedural History

This matter originated as a lawsuit in Hennepin County District Court challenging the pre-April 1, 1976, provisions of Minn. Stat. § 179.65, subd. 2. The trial court found that the fair share fee provisions of Section 179.65, subd. 2, violated the due process clauses of the Minnesota and United States Constitutions in that no provision was made for notice and hearing prior to the determination of the fair share fee. The RFT appealed and the Minnesota Su-

preme Court reversed the decision of the district court.[1] The case was then appealed to the United States Supreme Court which vacated the judgment of the Minnesota Supreme Court and remanded the case for further consideration in light of Chapter 102 of the 1976 Session Laws of Minnesota.[2] The [2] Minnesota Supreme Court remanded the case to the Hennepin County District Court[3] which referred the matter to the Bureau of Mediation Services (hereinafter "BMS") for exhaustion of administrative remedies.[4]

On March 22, 1977, petitions were filed with BMS on behalf of Challengers contesting the fair share fee assessed by the RFT. Separate challenges were filed for the period prior to April 1, 1976 (Case Nos. 78-FSC-380-A and 78-FSC-382-A) and the period following April 1, 1976, the effective date of the amendments to Minn. Stat. § 179.65, subd. 2 (Case Nos. 78-FSC-379-A and 78-FSC-381-A). This procedure was agreed to by the parties and by Judge Crane Winton in his Order dated March 14, 1977.

In a decision dated September 20, 1977, the Director dismissed the post-April 1, 1976, challenges. Challengers appealed and we, by Order dated September 21, 1978, remanded the matter to the Director for hearing. Separate hearings were held by the Director in the pre- and post-

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[1] Robbinsdale Educ. Ass'n., et al. v. Robbinsdale Fed. of Teachers, et al., 307 Minn. 96, 239 N.W.2d 437 (1976) vacated 429 U.S. 880 (1976).

[2] Threlkeld, et al. v. Robbinsdale Fed. of Teachers, Local 872, 429 U.S. 880 (1976).

[3] Robbinsdale Educ. Ass'n., et al. v. Robbinsdale Fed. of Teachers (Minn. Sup. Ct., Dec. 17, 1976).

[4] Robbinsdale Educ. Ass'n., et al. v. Robbinsdale Fed. of Teachers; Henn. Co. Dist. Ct., Order of Judge Crane Winton, March 14, 1977.

April 1, 1976, challenges. In an Order dated November 3, 1978, the Director found the pre-April 1, 1976, fair share fee assessment to be proper. Subsequently, in an Order dated January 16, 1979, the Director found the post-April 1, 1976, fair share fee assessment to be proper. Challengers appealed both decisions and requested that they be consolidated for hearing. This motion was granted and on July 13, 1979, a hearing was held on the consolidated appeals.

II. Facts

RFT is the duly certified exclusive representative of all teachers employed by Independent School District No. 281 and of a separate bargaining unit of educational aides employed by the School District. Challenger Threlkeld is a member of the educational aides' bargaining unit but is not a member of the RFT. Challenger Hanka was a member of the teachers' bargaining unit until June 4, 1976, and again from March 13, 1978, until June 9, 1978, but was not a member of the RFT.

In 1973, the Minnesota Legislature amended the Public Employment Labor Relations Act (hereinafter "PELRA") to authorize exclusive representatives to collect a fair share fee for services rendered [3] from members of the bargaining unit who were not members of the exclusive representative. Minn. Stat. § 179.65, subd. 2, as amended by Minn. Laws 1973, ch. 635, § 10. Teachers were exempted from the payment of the fair share fee until January 1, 1975.

The membership of the RFT voted in May, 1974, to implement a fair share fee. Membership dues for aides for the 1974-75 school year were $44.00 and the fair share fee was established at $40.00. Payroll deductions of the fair share fee for non-RFT members of the educational aides' bargaining unit commenced in September, 1974. Fair share contributions from non-RFT members of the teachers' bargaining unit were instituted in January, 1975. Challengers

then filed the lawsuit contesting the validity of the fair share fee.

Effective April 1, 1976, the Minnesota Legislature amended Minn. Stat. § 179.65, subd. 2, to limit the maximum amount which could be charged as a fair share fee to 85% of the membership dues and to establish an administrative procedure through which the amount of the fee could be challenged. Minn. Laws 1976, ch. 102. The monthly fair share fee assessed Challenger Threlkeld from April 1, 1976, through June, 1976, was $3.74. The dues for a RFT member of the educational aides' bargaining unit were $4.40 per month.[5] The fair share fee assessed Challenger Hanka from April 1, 1976, through June, 1976, was $11.90 per month. The dues for a comparable RFT member in the bargaining unit were $14.70 per month. Challenges contesting the post-April 1, 1976, assessment were also filed.[6]

Dues paid by RFT members support several programs benefiting "members only". The evidence demonstrated, and the Director found, that expenditures by the RFT for the following items benefit "members only" and do not relate to negotiations or administration of a collective bargaining agreement:

[4] Liability Insurance

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[5] Between July 1, 1976, and June 30, 1977, dues for a RFT member of the educational aides' unit were $4.50 per month for 10 months and the fair share fee assessed Challenger Threlkeld was $3.83 per month. Between July 1, 1977, and June 30, 1978, dues were $47.00 and the fair share fee assessed Challenger Threlkeld was $40.00. The parties stipulated and agreed on the BMS record to refund Challengers certain overassessments made during the period April, 1976, through June, 1977.

[6] Challenger Hanka was assessed a fair share fee of $7.15 per month for the period during 1978 when he was a member of the teachers' bargaining unit as a half-time teacher. Dues for a comparable full-time teacher were $16.80 per month.

Political & Idealogical Action
Political Contributions
Political Action (Legislation)
Blood Bank
Publications (American Teachers)
Defense Fund
COPE
Social
Scholarship
Referendum
Lend-a-Hand
AFL-CIO Publications and Central Labor Union Council (teachers only)

The RFT calculated the portion of their budget and the dues attributable to these items, and based on that formula, arrived at the amount to be deducted from the dues figure to determine the fair share fee. If, for post-April 1, 1976, assessments, that figure—the portion of dues covering expenses for benefits available to all members of the bargaining unit—was greater than 85% of dues, the fair share fee assessed was 85% of dues. Otherwise, the fair share fee assessed was the amount arrived at through application of the formula.

III. Discussion

A. Pre-April 1, 1976, Fair Share Fees
Case Nos. 76-FSC-380-A and 78-FSC-382-A

Statutory authority for assessment of a fair share fee was created in 1973. Minn. Laws 1973, ch. 635, § 10, amending Minn. Stat. § 179.65, subd. 2 (1971), provided:

> . . . Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975, only,[1] all public

[1] Minn. Stat. § 179.63, subd. 10, clause (c) refers to teachers.

employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from

[5] the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

Since the right of the exclusive representative to assess a fair share fee is clearly established by this statutory provision, the issue in a fair share fee challenge is whether the amount of the fee assessed exceeds a pro rata share of the expenses incurred for services rendered in relationship to negotiations and administration of grievance procedures.

In determining which expenses of an exclusive representative relate to negotiations and administration of grievance procedures, it is instructive to review the obligations imposed on the exclusive representative by PELRA and at the purpose of the fair share fee legislation. The obligations of the exclusive representative are set out by the Director in his Order dated November 3, 1978, at pages 5-6. The purpose of the fair share fee legislation was described by the Minnesota Supreme Court in *Robbinsdale Education Association, et al. v. Robbinsdale Federation of Teachers Local 872*, 307 Minn. 93, 239 N.W.2d 437 (1976), vacated 429 U.S. 880 (1976), as follows:

> The state's reason for allowing appellant to assess a fair share fee is that a union selected as a bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit in a nondiscriminatory manner. Unless the nonmember em-

> ployees in the unit are compelled to contribute to the costs of union representation, they would enjoy the benefits of the bargaining process while the members of the exclusive representative are forced to assume the entire burden of paying for it. In addition, since the members of the exclusive representative may be unable to adequately finance the negotiations and administration of a collective bargaining agreement without such nonmember contributions, the resulting financial instability of the duly elected representative may jeopardize meaningful collective bargaining.

239 N.W.2d at 443 (footnote and citations omitted).

[6] We agree with the Court and the Director that to "meet the obligations mandated by the law, it is clearly evident that an exclusive representative must have personnel and fiscal capability." Order of November 3, 1978, at 6. As stated by the United States Supreme Court:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel may be required. Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees, . . . union and nonunion,' within the relevant unit.

Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 1792, —— L.Ed. —— (1977) (footnote and citations omitted).

We believe the Legislature was aware of these factors when it adopted the 1973 language of Minn. Stat. § 179.65, subd. 2, and sought, by limiting the fair share fee to services rendered for negotiation and administration, to exclude from the fee the costs attributable to the internal, institutional activities of the union which are of little or no benefit to the non-member or not made available to him or her. We view this as an attempt to distinguish between benefits from collective bargaining services and benefits from union membership and to exclude membership benefits from the fee. As we stated in our opinion in *Unfair Share Employees Organization of the Ramsey County Welfare Dept. and AFSCME Council No. 91, Local 151*, 77-FSC-106-A, Jan. 18, 1978, 8-9, (hereinafter *"Unfair Share Employees"*), quoting from an opinion of the Hawaii Public Employment Relations Board:

> . . . We view the words 'negotiating and administering an agreement' as a term of art which generally encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and 'tooling up' process related to a negotiating contract and administering the same after its consummation.
>
> [7] It virtually amounts to a residuum of the union's total activities after the 'union membership benefits' have been isolated and removed. This is the fair share of the collective bargaining costs to be reflected in the service fee.

We join the Director in applying the "residuum theory" to fair share fee challenges instituted to contest service fees assessed pursuant to the pre-April 1, 1976, language of Minn. Stat. § 179.65, subd. 2.[8] The costs attributable to

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[8] At the time of our decision in *Unfair Share Employees, supra*, we had not yet had the occasion to review the application of pre-

the services rendered by the exclusive representative in negotiations and administration are clearly more than those amounts expended for direct contract negotiations at the bargaining table and for the processing of specific grievances. Expenditures for training, preparation, gaining approval by the necessary public authorities and for all the other items enumerated above must be included. We believe the residuum approach best accomplishes the difficult task of allocating between collective bargaining services and union membership benefits.

B. Post-April 1, 1976, Fair Share Fees
Case Nos. 78-FSC-379-A and 78-FSC-381-A

In 1976, the Minnesota Legislature amended the fair share fee provisions of PELRA. Minn. Laws 1976, ch. 102. The amendments became effective April 1, 1976. As amended, Minn. Stat. § 179.65, subd. 2, now provides:

> . . . all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the costs of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer [8] of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in

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April 1, 1976, provisions of Minn. Stat. § 179.65, subd. 2. Now that we have had that opportunity, we believe that the amendments referred to in footnote 6 of that opinion serve to clarify the Legislature's intent in the original 1973 provisions.

> writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to section 179.71, subdivision 2.

We first reviewed this provision in *Unfair Share Employees, supra.* In that decision, we discussed and applied the residuum theory discussed above to the post-April 1, 1976, provisions of Minn. Stat. § 179.65, subd. 2. Our decision in that matter was appealed pursuant to the Administrative Procedures Act.

In *Unfair Share Employees Organization of the Ramsey County Welfare Department v. Public Employment Relations Board,*[9] Judge Archie Gingold affirmed our decision and upheld the use of the residuum theory for determining the validity of fair share fee assessments. We do not find Challengers' arguments concerning the residuum approach persuasive. Therefore, for the reasons outlined in our opinion in *Unfair Share Employees, supra,* we believe the decision of the Director in this matter is correct.

IV. Conclusion

The Director correctly found that the amounts of the fair share fees in these challenges were correct. Accord-

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[9] Ramsey County District Court File No. 425616 (Order of Judge Archie Gingold, May 23, 1979).

ingly, the decisions of the Director in Case Nos. 78-FSC-380-A and 78-FSC-382-A and Case Nos. 78-FSC-379-A and 78-FSC-381-A are affirmed.

/s/ Thomas G. Arneson
THOMAS G. ARNESON

[9]

/s/ Don L. Bye
DON L. BYE

/s/ Sidney S. Feinberg
SIDNEY S. FEINBERG

/s/ Lorraine T. McCloud
LORRAINE T. MCCLOUD

/s/ Karen A. Olsen
KAREN A. OLSEN

Dated at Saint Paul, Minnesota,
December 6, 1979

POST-1 APRIL 1976 "FAIR-SHARE" DETERMINATION OF THE MINNESOTA BUREAU OF MEDIATION SERVICES, 16 JANUARY 1979

(unreported)

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES
VETERANS SERVICE BUILDING
Saint Paul 55155
Phone 612-296-2525

IN THE MATTER OF:
INVESTIGATION AND DETERMINATION
OF FAIR SHARE FEE ASSESSMENT:

Marilyn Threlkeld and Daniel Hanka, Challengers
-and-
Robbinsdale Federation of Teachers Local 872,
Robbinsdale, Minnesota
-and-
Independent School District No. 281,
Robbinsdale, Minnesota

CASE Nos. 78-FSC-379-A and 78-FSC-381-A

FAIR SHARE DETERMINATION

On Monday, November 20, 1978, and on Wednesday, December 6, 1978, at the Regency Plaza (formerly Kahler Motel), Minneapolis, Minnesota, hearings were held by the Bureau of Mediation Services, State of Minnesota, pursuant to the *post-april 1976* fair share challenges filed by Marilyn Threlkeld and Daniel Hanka raised under those sections of the Public Employment Labor Relations Act (PELRA) of 1971, as amended, dealing with fair share fee assessments: Minn. St. 179.63, subd. 19; Minn. St. 179.65, subd. 2; and Minn. St. 179.71, subd. 2(e).

The continuance of the November 20, 1978, hearing to December 6, 1978, was agreed to by the parties to allow the Robbinsdale Federation of Teachers to produce additional documentation. This documentation, which included all monthly Treasurer's Reports of the RFT for the period April 1976 through October 1978, was supplied to each of the parties prior to the second hearing.

At the hearings all interested parties were provided an opportunity to present testimony and evidence pertinent to the questions raised by the filing of the challenges. There was no representative of Independent School District No. 281, Robbinsdale, Minnesota, present at the hearing, and Challenger Hanka did not make an appearance.

Issue

Does the fair share fee assessment, which does not exceed 85 percent of the regular membership dues, include the cost of benefits available only to members of the exclusive representative?

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Case Nos. 78-FSC-379-A and 78-FSC-381-A
Fair Share Determination

Mr. Roger A. Peterson, Attorney for the Robbinsdale Federation of Teachers, moved for dismissal of the challenges on the grounds that BMS Rule 154(c) (1 through 14) does not apply in this case inasmuch as the rules were adopted by the Bureau and approved by PERB subsequent to the filing of the challenges and that the petitions fail to specify those portions of the assessment challenged.

Mr. Darel F. Swenson, Attorney for the Challengers, moved for a continuance of the hearing to allow the challengers to engage in discovery sufficient to enable them to determine what the specific portions of the assessment are in order for them to challenge with specificity. This issue of pre-hearing discovery was determined by the Bureau on January 11, 1978, in the pre-April 1976 case involving the same challengers.

The parties stipulated and agreed on the record to refund to the challengers certain overassessments made during the period April 1976 through June 1977.

Challengers asserted that they have no knowledge of any benefits available to fair share fee payers from the exclu-

sive representative and that there are certain other benefits available to members only and represent expenditures of an amount greater than that by which the regular membership dues were reduced in arriving at the amount of the fair share fee.

Mr. Peterson submitted a response to the challengers' above statement in the form of exhibits showing the members-only benefits which include:

Liability Insurance
Publications (American Teacher)
Political & Ideological Action
Defense Fund
Political Contributions
COPE Committees (MFT and Local)
AFL-CIO Publications and Central Labor Union Council (teachers only)
Political Action (Legislation)
Social
Blood Bank
Scholarship
Referendum
Lend-a-Hand

He further contended that the remaining benefits are within the

"residuum," as found in Threlkeld and Hanka v. Robbinsdale Federation of Teachers Local 872, Case Nos. 78-FSC-380-A and 78-FSC-382-A, issued November 3, 1978, which sets forth the Minnesota Residuum Theory.

Findings

After a careful review of all evidence, argument, and written documentation provided by the parties in this matter, as Director of the Bureau of Mediation Services, State of Minnesota, I hereby find:

1. The following benefits are "member-only benefits":

Liability Insurance
Publications (American Teacher)
Political & Ideological Action
Defense Fund
Political Contributions
COPE Committees (MFT and Local)
AFL-CIO Publications and Central Labor Union Council (teachers only)
Political Action (Legislation)
Social
Blood Bank
Scholarship
Referendum
Lend-a-Hand

2. The remaining benefits are within the "residuum." These activities are an integral part of an employee organization and are essential if the employee organization is to provide the numerous services required by law of an exclusive representative.

Decision

1. The fair share fee assessment for the period April 1976 to June 196, which does not exceed 85 percent of the regular membership dues and which does not include the cost of benefits available only to members of the exclusive representative, is determined to be proper. Although not accepting the 1977-78 challenge as valid, we find that the fair share fee assessment does not exceed 85 percent. Therefore, the challenges are without merit.

2. The Robbinsdale Federation of Teachers shall refund to

[4] Page 4
Case Nos. 78-FSC-379-A and 78-FSC-381-A
Fair Share Determination

Challenger Threlkeld 99 cents, the amount of the over-assessment.

3. All monies held in escrow by Independent School District No. 281, Robbinsdale, Minnesota, for the challengers herein, shall be transmitted to the exclusive representative immediately upon the effective date of this order.

4. The school district shall make and post sufficient copies of this order in a conspicuous place at the work location(s) of the employees involved.

In accordance with BMS Rule 154(f), this decision and order shall become effective 10 days after date of issuance unless appealed to PERB.

BUREAU OF MEDIATION SERVICES
STATE OF MINNESOTA

/s/ Ernest H. Jones
ERNEST H. JONES, *Director*

EHJ:el
cc: Dr. LeRoy Hood (2) (Includes Posting)
Barry K. Noack
Darel F. Swenson
Roger A. Peterson
Marilyn Threlkeld
Daniel Hanka
Eric R. Miller
MFT
Stephen F. Befort
Tom Fraser
Charles Shaffer

Dated at St. Paul, Minnesota,
January 16, 1979

PRE-1 APRIL 1976 "FAIR-SHARE" DETERMINATION OF THE MINNESOTA BUREAU OF MEDIATION SERVICES, 3 NOVEMBER 1978

(unreported)

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES
VETERANS SERVICE BUILDING
Saint Paul 55155
Phone 612-296-2525

IN THE MATTER OF:
INVESTIGATION AND DETERMINATION
OF FAIR SHARE FEE ASSESSMENT:

Marilyn Threlkeld and Daniel Hanka
-and-
Robbinsdale Federation of Teachers Local 872,
Robbinsdale, Minnesota
-and-
Independent School District No. 281,
Robbinsdale, Minnesota

CASE Nos. 78-FSC-380-A and 78-FSC-382-A

FAIR SHARE DETERMINATION

On Wednesday, February 1, 1978, at the Veterans Service Building, St. Paul, Minnesota, a hearing was held by the Bureau of Mediation Services, State of Minnesota, pursuant to pre-April 1976 fair share challenges filed by Marilyn Threlkeld and Daniel Hanka under Minn. St. 179.65, subd. 2. At the hearing all interested parties were provided an opportunity to present testimony and evidence pertinent to the questions raised by the filing of the two challenges, which were combined for purposes of this hearing.

Procedural History

The case between Threlkeld and Hanka, the two challengers, and the Robbinsdale Federation of Teachers commenced as a lawsuit in Hennepin County District Court. The trial court found that the "fair share" statute violated the due process clauses of the Minnesota and United States

Constitutions in that "it makes no provision for notice and hearing prior to the determination of the fair share fee for services." The Federation subsequently appealed the decision to the Minnesota Supreme Court which reversed the decision of the lower court. The case was then appealed to the United States Supreme Court which vacated the judgment of the Minnesota Supreme Court and remanded the case to the Minnesota Supreme Court "for further consideration in light of Chapter 102 of the 1976 Session Laws of Minnesota." The Minnesota Supreme Court then remanded the case to the Hennepin County District Court which referred the matter to the Bureau of Mediation Services for exhaustion of administrative remedies under Minn. St. 179.63, subd. 19; Minn. St. 179.65, subd. 2; and Minn. St. 179.71, subd. 2(e), which provides for

[2] Page 2
Case Nos. 78-FSC-380-A and 78-FSC-382-A
Fair Share Determination

administrative resolution of disputes regarding fair share fee assessments.

The parties stipulated and agreed the instant case should be decided on the language contained in Minn. St. 179.65, subd. 2, the fair share statute in effect prior to April 1, 1976, which read as follows:

> "Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public em-

ployees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

The parties further stipulated and agreed to incorporate into the record by reference the initial pleadings, all stipulations, and the record established in district court for appeal to the Minnesota Supreme Court; the writ in the United States Supreme Court; and the remand and additional proceedings conducted in district court referring the matter to the Bureau of Mediation Services.

The parties stipulated and agreed on the record to refund to the challengers certain overassessments made during the period July 1, 1974 through March 30, 1976.

Issue

Is the amount of the fair share fee assessment for the period July 1, 1974 to March 30, 1976 legal?

[3] Page 3
Case Nos. 78-FSC-380-A and 78-FSC-382-A
Fair Share Determination

Position of Challengers

Darel F. Swenson, counsel for the challengers, made the following contentions:

1. The burden of proof rests entirely upon the exclusive representative to show that the amount of the fair share fee assessment complies with Minn. St. 179.65, subd. 2, and the Federation must present clear and convincing evidence that the amount assessed represents a pro rata share of the specific expenses incurred for services rendered by the exclusive representative in relationship to negotiations and administration of grievance procedures.

2. Challengers have no knowledge of any benefits available to fair share fee payers from the exclusive representative; consequently, the exclusive representative has the burden of proving all issues raised by the challenges since only the Federation has knowledge of the services it rendered to the bargaining unit which are related to negotiations and administration of grievance procedures and the costs of rendering those services. As a general rule of law, when evidence is peculiarly within the possession or knowledge of one party, it is his duty to produce it or accept the inference that the evidence, if produced, would be unfavorable to his case.

3. In addition to the member-only benefits admitted to by the Federation, certain other benefits were available to members only and represent expenditures of an amount greater than that by which the regular membership dues were reduced in arriving at the amount of the fair share fee. The benefits questioned were: Activities and salaries of officers, staff personnel, and clerical personnel; activities of lobbyists and standing committees; per capita fees to affiliates; office expenses; and membership meetings.

4. The "residuum theory" places on challengers the burden of proving the existence of "member-only" benefits not admitted to by the Federation. However, it is impossible for challengers to meet the burden of proof imposed on them by the "residuum theory" because the Bureau has denied them the opportunity to engage in discovery.

5. Challengers and other fair share fee payers were charged a graduated fair share fee inasmuch as regular membership dues were based on a graduated system (1 percent of salary). This method of computation resulted in fair share payers being assessed different amounts although, supposedly, receiving the same "services" from the Federation.

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Case Nos. 78-FSC-380-A and 78-FSC-382-A
Fair Share Determination

Position of Exclusive Representative

Roger A. Peterson, counsel for the Robbinsdale Federation of Teachers, made the following contentions:

1. The Federation has complied with the law in the assessment, deduction, and justification of the fair share fee assessed challengers.

2. The amount of the fair share fee assessment was determined by utilizing the "residuum theory": After deducting the cost of member-only benefits from the regular membership dues, the remainder represents the fair share fee assessment for negotiations and administration of grievance procedures and expenses related thereto. It also represents an amount which is necessary to fulfill the statutory obligations of an exclusive representative, as set forth in the Public Employment Labor Relations Act of 1971, as amended.

3. Exhibits introduced into evidence indicated the member-only benefits which were deducted to arrive at the fair share fee assessment. These benefits included: Liability Insurance, Publications (American Teacher), Political & Ideological Action, Defense Fund, Political Contributions, AFL-CIO Publications and Central Labor Union Council (teachers only), Political Action, Social, Blood Bank, Scholarship, Referendum, Lend-a-Hand, and COPE.

Counsel for the Federation stated that the "residuum theory" was created in broad outline by the legislature when it enacted the original fair share fee statute in 1973. It was later named and refined by the Hawaii Public Employment Relations Board (PERB) whose decision was adopted by the Bureau in Case No. 77-FSC-106-A on July 1, 1977. In adopting the language of the Hawaii PERB, the Bureau indicated that fair share fees were collectible for a broad range of activities including, but not limited to, the physical acts of negotiating and grievance administration; that acts ancillary to, and a necessary prerequisite for, negotiations and grievance administration must also be compensable. Thus, the Bureau's statement that the scope of activities for which a fair share fee could be assessed includes virtually all activities "after the 'union membership benefits' have been isolated and removed" is consistent. The proper amount of the fair share fee is the amount of regular membership dues less the cost of member-only benefits, and the fair share fee payer is required to pay his proportionate cost of all legitimate costs of the Federation except those relating to items available to members only.

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Case Nos. 78-FSC-380-A and 78-FSC-382-A
Fair Share Determination

Discussion

The provisions of the Public Employment Labor Relations Act (PELRA) of 1971, as amended, governing the assessment of a fair share fee clearly establish the right of an exclusive representative to assess a fair share fee with the limitation that the said fee shall not exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures. In determining the appropriate pro rata amount of a fair share fee, the Bureau

must consider not only Minn. St. 179.65, subd. 2, but also all other provisions of PELRA relating to a certified exclusive representative and the services it must render to all employees in the bargaining unit.

In addition to according public employees the right to form and join employee organizations for purposes of collective bargaining, the Act also imposes the following specific obligations upon an exclusive representative:

> Minn. St. 179.61(2) requires the meeting and negotiating with public employees in an appropriate bargaining unit and a written contractual agreement between the parties.
>
> Minn. St. 179.61(3) makes provision for "establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large."
>
> Minn. St. 179.63, subds. 5, 16, and 18, requires that the employee organization must "deal with public employers concerning grievances and terms and conditions of employment;" and meet and negotiate "with the good faith intent of entering into an agreement with respect to terms and conditions of employment," which would include "the employer's personnel policies affecting the working conditions of the employees."
>
> Minn. St. 179.65, subd. 4, requires: "Public employees through their certified exclusive representative have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the exclusive

representative to agree to a proposal or require the making of a concession."

Minn. St. 179.69 includes in the process of contract negotiations the submission of a negotiation notice, petition for mediation services, submissions of notice of impasse, and any subsequent arbitration procedures that may follow as a result of impasse or the withholding of services should the employer refuse arbitration in the case of other-than-essential employees.

Minn. St. 179.65, subd. 5, permits the checkoff of dues to assist in maintaining the fiscal responsibilities of the exclusive representative.

Minn. St. 179.66, subd. 10, ensures the availability of personnel to carry out the duties of an exclusive representative by requiring that the "employer must afford reasonable time off to elected officers or appointed representatives of the exclusive representative," even to the extent of providing leaves of absence as requested.

The Rules and Regulations of the Bureau of Mediation Services also define and reinforce the obligations placed upon an exclusive representative.

To meet the obligations mandated by law, it is clearly evident that an exclusive representative must have personnel and fiscal capability. In light of this, it would be difficult to identify more relevant expenditures than those involved with activities and salaries of officers, staff and clerical personnel, activities of lobbyists and standing committees, per capita fees to affiliates, office expenses, and membership meetings as questioned by the challengers. Staffing, legislative efforts, training workshops, human and

civil rights protection, instruction and professional development, field operations, operating expenses, delegate expenses, building and administration, and governance are also examples of activities that are necessary for an exclusive representative to fulfill its obligations in meeting, negotiating, and administering a contract. Therefore, these activities would constitute an integral part of "specific expenses incurred for services rendered by the representative relative to negotiations and administration of grievance procedures" (the contract). This is the "residuum theory" as previously identified by the parties. Therefore, the proper amount of the fair share fee would be the amount

of regular membership dues less the cost of "member-only benefits."

Throughout the course of the hearing, the exclusive representative provided adequate documentation of the method utilized in arriving at the amount of the fair share fee assessment. Under the provisions of Minn. St. 179.65, subd. 2, the exclusive representative has met its burden of proof by identifying and detailing the benefits available to members only.

PELRA does not contain any provisions governing the dues structure of an employee organization. This is an internal matter and is established by the constitution and bylaws of the organization. Membership dues represent a payment to the exclusive representative for the services it renders to its members. Therefore, if an exclusive representative determines that a graduated dues structure is appropriate, then it may also determine that a graduated fair share fee assessment structure is appropriate. The dues structure is not challengeable under Minn. St. 179.65, subd. 2.

The issue of pre-hearing discovery has been addressed in a determination issued by the Bureau on January 11, 1978, in the instant case.

Findings

After a careful review of all evidence, argument, and written documentation provided by the parties in this matter, as Director of the Bureau of Mediation Services, State of Minnesota, I hereby find:

1. The following benefits are "member-only" benefits:

Liability Insurance
Publications (American Teacher)
Political & Ideological Action
Defense Fund
Political Contributions
AFL-CIO Publications and Central Labor Union Council (teachers only)
Political Action
Social
Blood Bank
Scholarship
Referendum
Lend-a-Hand
COPE

2. The remaining benefits are within the "residuum." These

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Case Nos. 78-FSC-380-A and 78-FSC-382-A
Fair Share Determination

activities are an integral part of an employee organization and are essential if the employee organization is to provide the numerous services required by law of an exclusive representative.

Decision

1. The fair share fee assessment, which does not include the cost of benefits available only to members of the exclusive representative, is determined to be proper. Therefore, the challenges are without merit.

2. All monies held in escrow by Independent School District No. 281, Robbinsdale, Minnesota, shall be transmitted to the exclusive representative immediately upon the effective date of this order.

3. The school district shall make and post sufficient copies of this order in a conspicuous place at the work location(s) of the employees involved.

In accordance with BMS Rule 154(f), this decision and order shall become effective 10 days after date of issuance unless appealed to PERB.

BUREAU OF MEDIATION SERVICES
STATE OF MINNESOTA

/s/ Ernest H. Jones
ERNEST H. JONES, *Director*

EHJ:el
cc: Dr. LeRoy Hood (2) (Includes Posting)
Barry K. Noack
Darel F. Swenson
Roger A. Peterson
Marilyn Threlkeld
Daniel Hanka
Eric R. Miller
MFT
Richard Lockridge
Tom Fraser
The Honorable Crane Winton

Dated at St. Paul, Minnesota,
November 3, 1978

DETERMINATION ON *PRE*-HEARING DISCOVERY OF THE MINNESOTA BUREAU OF MEDIATION SERVICES, 11 JANUARY 1978

(unreported)

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES
VETERANS SERVICE BUILDING
Saint Paul 55155
Phone 612-296-2525

IN THE MATTER OF:
INVESTIGATION AND DETERMINATION
OF FAIR SHARE FEE ASSESSMENT:

Marilyn Threlkeld and Daniel Hanka
-and-
Robbinsdale Federation of Teachers Local 872,
Robbinsdale, Minnesota

CASE Nos. 78-FSC-380-A and 78-FSC-382-A

DETERMINATION OF PRE-HEARING DISCOVERY

Pursuant to an order by the Bureau of Mediation Services determining that a hearing will be scheduled with respect to the fair share fee challenges by Threlkeld and Hanka on the assessments withheld prior to April 1, 1976, by the Robbinsdale Federation of Teachers Local 872, a petition for leave to conduct discovery was filed by Darel F. Swenson, counsel for the challengers. A hearing was held on this matter on November 8, 1977, in the Veterans Service Building, St. Paul, Minnesota. In addition to the testimony adduced at the hearing, the parties were granted the opportunity to file briefs in support of their positions.

Position of the Challengers

Challengers assert that absent the opportunity to engage in discovery—particularly the submission of interrogatories, taking of depositions, and submission of requests for production and inspection of documents—they will have no knowledge of the basis of the Union's claim prior to the hearing and therefore no information upon which to prepare a case.

Challengers assert that the same discovery opportunity should be available to them as was available in Hennepin County District Court at the commencement of proceedings on this challenge. Further, challengers assert that the Bureau of Mediation Services has the jurisdiction to promulgate rules of discovery with respect to fair share fee challenges.

Position of the Federation

Counsel for the Federation asserts that pre-hearing discovery procedures are unnecessary since the Bureau of Mediation Services

has determined in its order of September 20, 1977, that it is the burden of the Union to prove that the amount of the fair share fees complied with the governing statute. That information will be presented at the hearing on the matter and subject to cross-examination by the challengers.

The authority of the Bureau of Mediation Services to establish rules with respect to pre-hearing discovery is questioned by the Federation. Even assuming such authority, however, the Federation asserts that such rules would have to be specifically promulgated and pre-hearing discovery could not be granted by an order.

Position of Amici Curiae

Several employee organizations were granted amicus curiae status by the district court and have therefore been granted an opportunity to present their view on the instant matter. They assert that the issue of discovery is not a constitutional issue and that denial of discovery does not mean a denial of due process. A fair hearing means an

opportunity for cross-examination and presentation of witnesses. Further, they question the jurisdiction of the Bureau of Mediation Services to promulgate rules providing for discovery.

Discussion

Our research leads us to the conclusion that the Bureau of Mediation Services probably has the power to promulgate rules providing for pre-hearing discovery. Although Minnesota courts have apparently not addressed the issue, the Administrative Procedures Act does not specifically bar or grant pre-hearing discovery. However, pre-hearing discovery is allowed by the rules of the Office of Hearing Examiners and apparently by some other administrative agencies which are not bound by the Office of Hearing Examiners. Although it might be reasonable for the Bureau of Mediation Services to promulgate rules on pre-hearing discovery, the fact is that no rules currently exist; and the Bureau of Mediation Services does not therefore have the power to order pre-hearing discovery in the instant case.

In summarizing his position with respect to discovery, counsel for the challengers states that he views the basic problem as one of being wronged if the challengers are expected to go to a hearing "in the dark." The challenges under consideration assert that the exclusive representative has the burden of proof relating to all issues raised by the challenges. The challenges, however, do not raise any specific issues which must be met by the exclusive

representative, but question the fact that any benefits are received from the exclusive representative by stating that the challengers have no knowledge of any benefits so received. Thus, it would appear that the exclusive representa-

tive is the party expected to go to the hearing without notice. It must be remembered that the legislature has determined that the responsibilities of exclusive representatives require that they may receive financial support from all employees who are represented and to the extent that those responsibilities are related to their legal obligations as exclusive representatives in collective bargaining.

The order determining that a hearing will be scheduled in the instant case made it clear that information will be provided to the challengers prior to the hearing. An extension was provided because of the passage of time since this action commenced some years ago. Both parties agreed to the need for some additional time for review and preparation prior to a hearing, but the delay has been a result of the intervening petition to conduct discovery. With our determination that pre-hearing discovery will not be granted, the hearing may now be scheduled. At that hearing the Federation has the burden of proof with respect to the amount of the fair share fee assessment withheld prior to the April 1, 1976, changes in Minn. St. 179.65, subd. 2. The challengers will have full opportunity for cross examination and may present testimony and evidence pertinent to the questions raised by their challenges.

Decision

The request for pre-hearing discovery by challengers Threlkeld and Hanka is hereby denied.

BUREAU OF MEDIATION SERVICES
STATE OF MINNESOTA

/s/ Viola M. Kanatz
VIOLA M. KANATZ,
Deputy Director

VMK : el
cc: Roger A. Peterson
Darel F. Swenson
Gregg M. Corwin
Eric R. Miller
Robert F. Pueringer
David Y. Morris
The Hororable Crane Winton

Dated at St. Paul, Minnesota,
January 11, 1978

ORDER OF THE SUPREME COURT OF MINNESOTA REMANDING THIS CASE TO THE DISTRICT COURT FOR HENNEPIN COUNTY, MINNESOTA, 17 DECEMBER 1976

307 Minn. 110 (1976)

STATE OF MINNESOTA
IN SUPREME COURT

ROBBINSDALE EDUCATION ASSOCIATION, ET AL, *Respondents*,

46216 v.

ROBBINSDALE FEDERATION OF TEACHERS LOCAL 872, *Appellant*,
INDEPENDENT SCHOOL DISTRICT 281, *Respondent*.

ORDER

Marilyn Threlkeld and Daniel Hanka having appealed from the judgment of the Supreme Court of the State of Minnesota entered herein on February 11, 1976, and

The Supreme Court of the United States having entered the following order with respect to said appeal on October 12, 1976:

> "RE: THRELKELD, ET AL. V. ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, 75-1628
>
> "The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further consideration in light of Chapter 102 of the 1976 Session Laws of Minnesota. *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972)."

and

Darel F. Swenson, of Mannikko & Swenson, Attorneys at Law, Wayzata, Minnesota, having moved this court for an order—

> "A. Remanding the above-entitled action to the Honorable Crane Winton, a Judge of the Hennepin County District Court, who heard argument and decided the issues in this case at the trial court level,

"B. Granting leave to plaintiffs-respondents to move to amend their Complaint, and

"C. Directing that the legal and factual issues raised in the Amended Complaint be heard and decided by Judge Winton with rights in plaintiffs-respondents to appeal to this Court from the judgment entered pursuant to Judge Winton's decision."

[2] and

Roger A. Peterson, of Peterson, Engberg & Peterson, Attorneys at Law, Minneapolis, Minnesota, having appeared before this court in response to said motion; and

The court being fully advised in the premises, it is

ORDERED AND DIRECTED that the above entitled matter be and is hereby remanded to the Hennepin County District Court for further proceedings, including the consideration of such motions as may be made by the parties for amendments of the pleadings on file herein and for the determination of such legal and factual issues as may be required in light of the order of the United States Supreme Court set out above and the pleadings herein, together with such amendments as may be allowed by the said district court.

Rights of appeal are reserved.

Remanded to the Hennepin County District Court for further proceedings.

Dated December 17th 1976.

MINNESOTA SUPREME COURT

By /s/ Robert J. Sheran
Chief Justice.

DECISION OF THE SUPREME COURT OF THE UNITED STATES VACATING THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA, 12 OCTOBER 1976

429 U.S. 880 (1976)

Vacated and Remanded on Appeal

No. 75-1628. THELKELD ET AL. *v.* ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, ET AL. Appeal from Sup. Ct. Minn. Judgment vacated and case remanded for further consideration in light of Chapter 102 of 1976 Session Laws of Minnesota. *Fusari* v. *Steinberg*, 419 U. S. 379 (1975); *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412 (1972). Reported below: 307 Minn. 96, 239 N. W. 2d 437.

OPINION OF THE SUPREME COURT OF MINNESOTA SUSTAINING THE CONSTITUTIONALITY OF THE ORIGINAL "FAIR-SHARE" STATUTE, 23 JANUARY 1976

307 Minn. 96, 239 N.W.2d 437 (1976)

ROBBINSDALE EDUCATION ASSOCIATION AND OTHERS v. ROBBINSDALE FEDERATION OF TEACHERS LOCAL 872 AND ANOTHER.*

239 N. W. 2d 437.

January 23, 1976—No. 46216.

Public employees—fair share statute—constitutionality—procedural due process.

Minn. St. 179.65, subd. 2, the so-called fair share statute, does not violate constitutional standards of procedural due process since we interpret the Public Employment Labor Relations Act, of which § 179.65, subd. 2, is a part, to implicitly provide that a public employee has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined, and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper amount of the fair share fee.

Same—same—same—requiring payment of fair share fee before hearing on validity.

The fact that in the absence of unusual circumstances the hearing and final judicial determination of the fee's validity and amount will probably not occur prior to the actual withholding of the fair share fee from the employee's paycheck does not by itself render the statute unconstitutional.

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* Judgment vacated and case remanded, 429 U.S. 880, 97 S. Ct. 225, 50 L. ed. 2d 160 (1976).

Action in the Hennepin County District Court brought by Robbinsdale Education Association, Marilyn Threlkeld, and Daniel Hanka challenging the validity of a statute which allowed defendant Robbinsdale Federation of Teachers Local 872, which was certified as exclusive representative of certain bargaining units of defendant Independent School District No. 281, to assess [97] a fair share fee from employees in such bargaining units who are not members of defendant union. After findings for plaintiffs, Crane Winton, Judge, defendant union appealed from the judgment entered. Reversed.

Peterson, Engberg & Peterson, Roger A. Peterson, and *William F. Garber,* for appellant.

Larson, Mannikko & Swenson and *Darel F. Swenson,* for respondent plaintiffs.

LeVander, Zimpfer & Tierney and *Bernard G. Zimpfer,* for respondent school district.

Gregg M. Corwin, Zwerdling, Maurer, Diggs & Papp, and *A. L. Zwerdling,* for American Federation of State, County and Municipal Employees, amicus curiae, seeking reversal.

Peterson, Popovich, Knutson & Flynn, Peter S. Popovich, and *Richard J. Sands,* for Minnesota School Boards Association, amicus curiae, seeking affirmance.

Mullin, Swirnoff & Weinberg, William E. Mullin, and *Edwin Vieira, Jr.,* for The National Right to Work Legal Defense Foundation, amicus curiae, seeking affirmance.

Lee L. LaBore, for Robert Hedin, teachers from Hutchinson Vocational School, Jack Borowski, and teachers from Canby Vocational School, amici curiae, seeking affirmance.

Oppenheimer, Wolff, Foster, Shepard & Donnelly and *Eric R. Miller,* for Minnesota Education Association, amicus curiae, seeking reversal.

Peterson, Bell & Converse and *Roger A. Jensen*, for Minnesota Teamsters Public and Law Enforcement Employees' Union, Local 320, amicus curiae, seeking reversal.

Oppenheimer, Wolff, Foster, Shepard & Donnelly, and *Eric R. Miller* and *Stephen M. Nassau*, for National Education Association, amicus curiae, seeking reversal.

Heard and considered by the court en banc.

MacLaughlin, Justice.

The sole issue on this appeal is whether Minn. St. 179.65, subd. 2, the "fair share" statute, deprives an individual of property [98] without providing procedural due process. The trial court concluded that the statute violated the due process clauses of the Minnesota and United States Constitutions in that "it makes no provision for notice and hearing prior to the determination of the fair share fee for services." We reverse.

The "fair share" statute is a part of the Public Employment Labor Relations Act (PELRA), Minn. St. 179.61 to 179.77. The purpose behind PELRA is to "promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare." § 179.61. The legislature recognized that "unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary" to fulfill this purpose. Id. As a result, PELRA provides that any bargaining unit of employees may elect by majority vote an employee organization representative who shall then be certified as the "exclusive representative of all employees in the unit." § 179.67, subd. 12. The act contemplates that all employees in a given bargaining unit are entitled to share equally in the benefits obtained by the exclusive representative through negotiations or grievance

proceedings. Consequently, the act provides in § 179.65, subd. 2:

"* * * [A]ll public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

[99] Appellant, Robbinsdale Federation of Teachers Local 872, is an employee organization whose members are some, but not all, of the employees of Independent School District No. 281. Appellant has been elected the exclusive representative of all employees in the school district belonging to certain bargaining units, whether the employees are members of appellant or not.[1] Respondents Marilyn Threlkeld, a nonprofessional employee of the school district, and Daniel Hanka, a professional employee of the school district, are not members of appellant but are, of course, represented by appellant in bargaining and grievance procedures. Respondent Robbinsdale Education Association is an employee organization which has as its members some of the professional employees of the school district.

In May 1974, appellant voted to require a fair share contribution from all the employees of the school district represented by appellant but who are not members of appellant, such as respondents Threlkeld and Hanka, and

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[1] Minn. St. 179.65, subd. 2, provides that "[p]ublic employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative * * *."

many of the members of the Robbinsdale Education Association. Appellant notified the school district of the amount of the fair share fee; and the school district, pursuant to § 179.65, subd. 2, began withholding or checking off from the paychecks of respondents Threlkeld and Hanka, among others, the designated amount of the fair share fee. Appellant informed respondents Robbinsdale Education Association and Hanka prior to the time of the first checkoffs, but did not so inform respondent Threlkeld. At no time were any of the respondents given an opportunity for a hearing by an independent and impartial body regarding their objections to the checkoff from their earnings of fair share contributions or the amount of such checkoffs.

On November 6, 1974, respondents brought this action challenging the validity of § 179.65, subd. 2. An agreement was reached by the parties on December 18, 1974, which provided [100] that all fair share funds withheld from the employees' paychecks would be placed in an escrow account pending final determination of this action. On the basis of an agreed statement of facts, the trial court held that § 179.65, subd. 2, violated the due process clauses of the Minnesota and United States Constitutions because there is no provision for notice and hearing prior to the determination of the fair share fee.

The issue before the trial court, and before this court, is whether the fair share statute passes constitutional muster when neither it nor any of the other provisions of PELRA specifically provides for a hearing prior to the imposition of the fair share fee upon nonmembers of appellant. This act, like every legislative enactment, comes to us with a presumption in favor of its constitutionality. Klicker *v.* State, 293 Minn. 149, 197 N. W. 2d 434 (1972); Head *v.* Special School Dist. No. 1, 288 Minn. 496, 182 N. W. 2d 887 (1970), certiorari denied sub nom. Minneapolis Federation of Teachers, Local No. 59, *v.* Spannaus, 404 U. S. 886, 92 S. Ct. 196, 30 L. ed. 2d 168 (1971). The burden of proof is on the

challenging parties to show beyond a reasonable doubt that the act is unconstitutional. Minneapolis Federation of Teachers *v.* Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966). Further, it is well established that when the constitutionality of a statute is challenged, the language of the entire act must be taken into consideration, and "[i]f the act is reasonably susceptible of two different constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be adopted." State *v.* Suess, 236 Minn. 174, 181, 52 N. W. 2d 409, 414 (1952); In re Taxes on Property of Cold Spring Granite Co. 271 Minn. 460, 136 N. W. 2d 782 (1965).

Since PELRA is challenged on the ground that it denies procedural due process,[2] it is particularly important that we consider [101] those provisions in the act which provide procedural remedies. Section 179.76 of the act states in part:

"It shall be the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment."

More importantly, § 179.68, subd. 1, of the act provides:

"Any employee * * * aggrieved by an unfair labor practice * * * may bring an action in district court of the county wherein the practice is alleged to have occurred for injunctive relief and for damages caused by such unfair labor practice."

Section 179.68, subds. 2 and 3, detail certain acts, or failures to act, which constitute unfair labor practices. Specifically,

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[2] All parties agree that persons in the position of respondents are entitled to a hearing on the validity and the amount of the fee at some stage of the proceeding, but respondents argue it must be prior to the withholding of the fee while appellant argues that it may be after the withholding.

§ 179.68, subd. 3(1), prohibits employee organizations from "restraining or coercing employees in the exercise of their rights as provided in sections 179.61 to 179.77." Considering these provisions together, we have concluded that the imposition upon a nonmember employee of a fair share fee which is not consistent with the provisions of the statute constitutes an unfair labor practice. Therefore, pursuant to § 179.68, subd. 1, a public employee aggrieved by such a practice may bring an action in district court for injunctive relief. Further, as we construe the statute, the district court, at the request of either party, may determine the validity and proper amount of the fair share fee.

In such an action, the district court shall, at the request of the complaining party, enjoin the *use* of the disputed fees until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee under the statutory formula; and the district court shall provide an appropriate escrow arrangement for the disputed fees until final determination of these questions. Further, the district court may, in the exercise of its sound and cautiously exercised discretion, enjoin the *collection* of such fees if it is persuaded by the complaining [102] party that the amount of the fee or the circumstances surrounding its assessment clearly indicate that the fee is invalid because it is so excessive that it is punitive or oppressive when measured against the statutory formula, or for other reasons which clearly contravene the statute.

In sum, we have concluded that PELRA should be construed to provide that the public employee has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined; and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper

amount of the fair share fee. We have concluded, however, that, in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the fair share fee from the employee's paycheck.

Due process is a flexible standard which does not guarantee any "particular form or procedure," but rather "protects substantial rights." N.L.R.B. *v.* Mackay Radio & Tel. Co., 304 U.S. 333, 351, 58 S. Ct. 904, 913, 82 L. ed. 1381, 1393 (1938). Most importantly, "[t]he determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected." Mitchell *v.* W. T. Grant Co. 416 U. S. 600, 624, 94 S. Ct. 1895, 1908, 40 L. ed. 2d 406, 423 (1974) (Powell, J., concurring). See, also, Goldberg *v.* Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. ed. 2d 287 (1970); Cafeteria & Restaurant Workers Union *v.* McElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L. ed. 2d 1230 (1961).

An examination of the conflicting state and individual interests in the instant case convinces us that the procedural remedies encompassed by the statute, as interpreted in this opinion, comply with due process standards. In reaching this conclusion, we [103] have first evaluated "the nature of the * * * private interests affected" in the instant case and have compared those interests to the individual interests involved in other cases in which the United States Supreme Court has required a hearing prior to the actual taking. In that connection respondents strongly argue that an individual's wages are a "specialized type of property" and that, under Sniadach *v.* Family Finance Corp. of Bay View, 395 U. S. 337, 89 S. Ct. 1820, 23 L. ed. 2d 349 (1969), an individual must be accorded a prior hearing before deductions may be made from his wages. In Sniadach, the court struck down a Wisconsin statute authorizing a creditor to garnish a debtor's wages without first providing a hearing. The court reasoned that even though

the debtor might ultimately recover the garnished wages in the main action the debtor was nevertheless deprived of the use of those funds during the interim.

"* * * Since this deprivation cannot be characterized as *de minimis,* [the debtor] must be accorded the usual requisites of procedural due process: notice and a prior hearing." 395 U. S. 342, 89 S. Ct. 1823, 23 L. ed. 2d 354 (Harlan, J., concurring).

We believe that the requirements of procedural due process depend not upon the particular "type of property" involved, but upon the effect of its deprivation on the individual. In Goldberg, the Supreme Court stated (397 U. S. 262, 90 S. Ct. 1017, 25 L. ed. 2d 296):

"* * * The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

This aspect of "grievous loss" also dominated the court's opinion in Sniadach (395 U.S. 340, 89 S. Ct. 1822, 23 L. ed. 2d 353):

[104] "A prejudgment garnishment of the Wisconsin type [up to 50 percent of the wages are frozen] is a taking which may impose *tremendous hardship* on wage earners with families to support. * * *

* * * * *

"The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." (Italics supplied.)

And in North Georgia Finishing, Inc. *v.* Di-Chem, Inc. 419 U. S. 601, 95 S. Ct. 719, 42 L. ed. 2d 751 (1975), the Supreme

Court's most recent pronouncement on procedural due process, the extent of injury to the individual remains a dominant concern (419 U. S. 608, 95 S. Ct. 723, 42 L. ed. 2d 758):

"* * * It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of *irreparable injury* in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error." (Italics supplied.)

The deprivation threatened by the fair share statute is of a much lesser magnitude than the "grievous loss" in Goldberg, the "tremendous hardship" in Sniadach, or the "irreparable injury" in North Georgia Finishing. In the instant case, the individual interest at stake is less than $10 per month. While this amount will no doubt vary depending on the circumstances, political realities prevent an exclusive representative from attempting to impose an excessively large fee. And if such an attempt it made, the individual employee will be protected by his right, as outlined herein, to enjoin, pending a hearing, the collection of the fee in cases which involve egregious circumstances. Thus, since there are sufficient safeguards in the fair share statute to protect the individual employee from any significant loss of property, safeguards which are lacking in all of the creditor [105] remedy statutes invalidated by the Supreme Court, the employee's need for a prior hearing is substantially reduced.

The second step in determining the requirements of due process is to examine the "nature of the governmental function involved." Mitchell v. W. T. Grant Co. *supra*. The state's reason for allowing appellant to assess a fair share fee is that a union selected as a bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit in a nondiscriminatory manner. Unless the nonmember employees in the unit are com-

pelled to contribute to the costs of union representation, they would enjoy the benefits of the bargaining process while the members of the exclusive representative are forced to assume the entire burden of paying for it. In addition, since the members of the exclusive representative may be unable to adequately finance the negotiation and administration of a collective bargaining agreement without such nonmember contributions, the resulting financial instability of the duly elected representative may jeopardize meaningful collective bargaining.[3] See, Buckley v. American Fed. of Television & Radio Artists, 496 F. 2d 305 (2 Cir. 1974), certiorari denied, 419 U.S. 1093, 95 S. Ct. 688, 42 L. ed. 2d 687 (1974).

We have concluded, and we believe our conclusion is supported by the applicable decisions of the United States Supreme Court, that the governmental interest in securing the financial stability of these exclusive representatives is sufficiently strong to override the individual's interest in obtaining a prior determination of the imposed fee's validity. In International Assn. of Machinists v. Street, 367 U. S. 740, 81 S. Ct. 1784, 6 L. ed. 2d 1141 (1961), and in Brotherhood of Railway & Steamship Clerks v. [106] Allen, 373 U. S. 113, 83 S. Ct. 1158, 10 L. ed. 2d 235 (1963), the United States Supreme Court considered the importance of the governmental interest in allowing unions to collect statutorily imposed fees. In Street, the plaintiffs complained that a provision of the Railway Labor Act which required employees to become members of the exclusive bargaining union and to pay fees required by the union violated the

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[3] This financial instability might "encourag[e] the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. This instability also encourages the employer to be obstinate, in hopes of forcing a favorable agreement from a weak union." Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 189.

First and Fifth Amendments in that it permitted the union to force them to financially support political causes which they opposed. The court construed the statute as prohibiting a union from using the forced fees, over employees' objections, to support political causes. In deciding the case, the court vacated a state court injunction against the collection of union fees, stating (367 U. S. 771, 81 S. Ct. 1801, 6 L. ed. 2d 1162):

"• • • [R]estraining collection of the funds • • • might well interfere with the appellant union's performance of those functions and duties which the [statute] places upon them to attain its goal of stability in the industry. • • • The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining,' • • •."

The court reached the same result in Allen (373 U. S. 120, 83 S. Ct. 1163, 10 L. ed. 2d 241):

"• • • We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, dissenting employees (at least in the absense of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered."

See, also, Railway Employes' Dept., AFL v. Hanson, 351 U. S. 225, 76 S. Ct. 714, 100 L. ed. 1112 (1956).

Thus, although not directly addressing the question of procedural due process, the United States Supreme Court has concluded that absent special circumstances the governmental interest in the regular collection of union fees should not be impaired [107] by a court injunction. So, too, we have concluded that absent special circumstances the district court should not enjoin the collection of the fair share fees. The "special circumstances" that would justify an injunction against collection would exist if either the amount of the fee, or the circumstances surrounding

its assessment, clearly indicate that the fee is invalid or unconscionable under the statutory provisions. In such a case, the state has no interest in permitting the exclusive representative to collect a patently invalid fair share fee.

On the other hand, the governmental interest in union stability is not so compelling as to bar an injunction against the use of the union fees until their validity has been determined in a hearing before the district court. The Supreme Court in Street, and again in Allen, approved a remedy which would enjoin the use of the disputed portion of the fees until the validity of such use could be determined.[4] The responsibility for initiating such a court determination properly rests with the individual employee. As stated in Street (367 U.S. 774, 81 S. Ct. 1803, 6 L. ed. 2d 1164), "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." Although the individual employees are responsible for initiating the action, it is the union which must bear the ultimate burden of proving the fee's validity. As the court stated in Allen (373 U.S. 122, 83 S. Ct. 1163, 10 L. ed. 2d 241):

"Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."

[108] Thus, the Supreme Court contemplated a procedure whereby upon a complaint by an employee a union would be unable to use the disputed portion of fees imposed by statute until the union proved that its use of such fees

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[4] The specific remedy suggested by the Court was an injunction against the use of that portion of the fee which "is the proportion of the union's total expenditures made for such political activities to the union's total budget." International Assn. of Machinists v. Street, 367 U. S. 740, 775, 81 S. Ct. 1784, 1803, 6 L. ed. 2d 1141, 1174. Under the facts of the instant case, there would be no need to employ such a formula.

complied with the governing statute. In the instant case, through the procedures we have outlined, a union would be unable to use the disputed fair share fees until the union proved that the amount of such fees complied with the governing statute.

The probability that under this procedure a particular fair share fee's validity and amount will not be finally determined after deductions have been made from the employee's paycheck does not render the statute unconstitutional. A prior hearing is not the sine qua non of procedural due process since "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Mitchell v. W. T. Grant Co. 416 U.S. 600, 610, 94 S. Ct. 1895, 1901, 40 L. ed. 2d 406, 415, quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. ed. 2d 1230, 1236 (1961). Again, it must be stressed that the procedural protections to which an individual is constitutionally entitled depend on the balancing of interests in each particular case. While the Supreme Court required a prior hearing in Sniadach v. Family Finance Corp. of Bay View, 395 U. S. 337, 89 S. Ct. 1820, 23 L. ed. 2d 349 (1969); Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. ed 2d 556 (1972); and North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U. S. 601, 95 S. Ct. 719, 42 L. ed. 2d 751 (1975), the balance of interests in those cases was significantly different from that in the instant case. As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in those cases, and the state's interest in the collection of the fair share fee is clearly more substantial than it was in Sniadach, Fuentes, and North Georgia Finishing, which involved creditor-debtor relationships of private citizens. Consequently, since in the instant case the individual's interest is less significant and the state's [109] interest is more substantial, the demands of procedural due process are correspondingly reduced.

In summary, we hold only that, with respect to procedural requirements, the fair share statute, Minn. St. 179.65, subd. 2, does not violate the due process clauses of the United States or Minnesota Constitutions.[5]

Finally, we invite the attention of the legislature to the questions raised by this appeal. Although there may be factors of which we are not aware, it would not appear that undue delay would be caused if, for example, before the fair share fee was imposed and withheld, the exclusive representative was required to document and submit its calculation of the fee to the director of mediation services or the Public Employees Labor Relations Board.[6] The director or the board could afford interested employees, prior to the actual payroll deduction of the fee, an opportunity to inspect and, if warranted, challenge the validity and amount of the fee. The director or board could then allow, disallow, or modify the proposed fee with a short written statement explaining the action.[7] Such a decisional process might render the imposition of the fee more acceptable to the nonmember employees while also developing a body of precedent to define the proper elements of expense to be included in the fair share fee. Any such procedures, however, are not for this court to impose, but must be left to the sound discretion of the legislature.

[110] Reversed.

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[5] We have not considered the question of the constitutionality of the fair share fee on grounds other than procedural due process.

[6] The powers and duties of these bodies are contained in Minn. St. 179.71 and 179.72.

In Hawaii, the Hawaii Public Employment Relations Board is the neutral tribunal which determines the bargaining service fee which nonunion employees must pay a majority union under a fair share agreement. See, 525 Govt. Employee Rel. Rep., October 15, 1973, at E-1.

[7] Of course, there would be a right to appeal to the district court from a determination of the director or board. Whether the fee could be deducted and held in escrow during the period of the appeal would be a question for legislative determination.

ORDER AND MEMORANDUM OF THE DISTRICT COURT FOR HENNEPIN COUNTY, MINNESOTA, DECLARING THE ORIGINAL "FAIR-SHARE" STATUTE UNCONSTITUTIONAL, 13 AUGUST 1975

90 L.R.R.M. 2702 (1975)

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 710101

ROBBINSDALE EDUCATION ASSOCIATION, MARILYN THRELKELD, an individual, and DANIEL HANKA, an individual,
Plaintiffs,

vs.

ROBBINSDALE FEDERATION OF TEACHERS LOCAL 872; and INDEPENDENT SCHOOL DISTRICT 281,
Defendants.

ORDER

The above-entitled matter came before the undersigned, one of the Judges of the above-named Court, at a General Term thereof, held in the Government Center, City of Minneapolis, Hennepin County, Minnesota, on July 9, 1975, pursuant to orders of the Honorable Douglas K. Amdahl, Chief Judge of this Court, dated May 13, 1975 and May 20, 1975. Darel F. Swenson, Esq., appeared for and on behalf of the plaintiffs, and Roger A. Peterson, Esq., appeared for and on behalf of the defendant Robbinsdale Federation of Teachers Local 872. Bernard G. Zimpfer, Esq., appeared for and on behalf of Independent School District 281.

The matter presented to the Court for its determination is the constitutionality of the fair share provisions of the Public Employment Labor Relations Act of 1971, Minn. Stat., § 179.65, subd. 2. The matter was submitted to the Court upon the Amended Request for Admissions of Fact and of Genuineness of Documents served by counsel for the plaintiffs on defendant Robbinsdale Federation of Teachers Local 872, Robbinsdale Federation of Teachers' [2] Acceptance of Statement of Admissions filed by its counsel, written briefs, and oral argument.

For purposes of this order and the accompanying memorandum, which by reference thereto is specifically incorporated herein, the following statutory definitions are applicable:

1. " 'Public employer' or 'employer' means and includes school districts and their respective representatives." Minn. Stat., § 179.63, subd. 4.

2. " 'Employee organization' means any union or organization of public employees whose purpose is, in whole or in part, to deal with public employees concerning grievances and terms and conditions of employment." Minn. Stat., § 179.63, subd. 5.

3. " 'Exclusive representative' means an employee organization which has been designated by a majority of those votes cast in the appropriate unit and has been certified pursuant to section 179.67." Minn. Stat., § 179.63, subd. 6.

4. A teacher is deemed to be a professional employee. Minn. Stat., § 179.63, subd. 10 (c).

5. " 'Appropriate unit' or 'unit' means a unit of employees, excluding supervisory employees, confidential employees and principals and assistant principals, as determined pursuant to section 179.71, subdivision 3, and in the case of school district, the term means all teachers in the district." Minn. Stat., § 179.63, subd. 17.

Upon the Amended Request for Admissions filed by plaintiffs and the acceptance thereof by defendant [3] Robbinsdale Federation of Teachers, hereinafter designated "Federation," the Court MAKES THE FOLLOWING:

FINDINGS OF FACT

1. Plaintiff Robbinsdale Education Association, hereinafter designated "Education Association," is an employee organization, the members of which are professional em-

ployees employed by Independent School District 281, hereinafter designated "School District."

2. Plaintiff Marilyn Threlkeld is a non-professional public employee who is employed by the school district as an educational aide. She is not a member of any employee organization.

3. Plaintiff Daniel Hanka is a professional employee of the school district but is not a member of any employee organization.

4. The defendant Federation is an employee organization whose members are some of the employees of the school district. It is the designated exclusive representative of the collective bargaining unit of certain public employees of the school district.

5. The members of the Education Association and plaintiffs Threlkeld and Hanka are members of separate bargaining units which are represented by the defendant Federation. Plaintiff Threlkeld is a member of the educational aides' bargaining unit, and plaintiff Hanka and members of the Educational Association are members of the certified teachers' bargaining unit.

6. At a meeting of its general membership held in May, 1974, the Federation voted to require a fair share contribution from all members of the bargaining unit represented by the Federation who are not members thereof.

[4] 7. Subsequently, the Federation budget committee, after consultation with the Federation treasurer, first determined the formula the Federation would use to fix the amount of the fair share contribution to be required by the Federation from each fair share payer. That contribution was determined to be the sum of $40.00 for each fair share payer.

8. The Federation notified the school district before September, 1974 of the Federation membership's decision

to require fair share contributions from plaintiff Threlkeld and, accordingly, in September, 1974, the school district began to check off amounts to the Federation from her salary. Plaintiff Threlkeld became aware for the first time of the fair share check off when she noticed in her first September, 1974 payroll check analysis that a fair share contribution had been checked off and deducted from her regular check payment.

9. In December, 1974, the Federation notified the school district of the Federation's membership decision to require fair share contributions from the teachers, and also brought to the school district's attention its obligation to check off fair share contributions from the earnings of teachers pursuant to Minn. Stat., § 179.65, subd. 2. Accordingly, in January, 1975, the school district began checking off fair share contributions from the earnings of teachers who were not members of the Federation pursuant to the above specified section of the statutes. Among those persons subject to the fair share check-off for teachers are members of the Education Association and plaintiff Hanka.

[5] 10. No notice was given to plaintiff Threlkeld by the school district that check-offs for fair share contributions would commence at any time before the check-offs began in September, 1974.

11. Nor did the school district at any time before commencement of the check-offs give notice to plaintiff Threlkeld of the amount that would be checked off from her earnings.

12. At no time before commencement of the check-offs of fair share contributions from plaintiff Threlkeld's earnings did the school district give her an opportunity for a full, fair, and impartial hearing at which she could state her views concerning the check-offs and the amounts to be checked off.

13. At no time before commencement of the check-offs of fair share contributions of the earnings of the members of the Educational Association and plaintiff Hanka did

the school district notify those persons that the check off would commence or of the amounts that would be checked off from their earnings.

14. At no time before the commencement of the check-offs of fair share contributions from the earnings of the members of the Education Association and plaintiff Hanka did the school district provide them, or any of them, an opportunity for a full, fair, and impartial hearing at which they could state their views and possible objections concerning commencement of the check off and amounts to be checked off.

[6] 15. In May, 1974, Joyce Morris, then president of the aides' unit, distributed a form letter to the aides employed by the school district inviting each of them to join the Federation and stating in part: "You will be charged a fair share fee anyway of $40.00 which is almost as much as $44.00 dues."

16. At no time before commencement of the check off of fair share contributions from plaintiff Threlkeld's earnings did the Federation give her an opportunity for a hearing at which she could state her objections to the commencement of the check-offs or the amounts to be checked off.

17. Before commencement of the check off of fair share contributions from the earnings of the members of the Education Association and plaintiff Hanka, the Federation by letter dated December 17, 1974, notified them that beginning January 1, 1975, fair share contributions would be checked off from their earnings and also what the amount of the fair share contributions would be.

18. At no time before commencement of the check-off of fair share contributions from the earnings of the members of the Education Association and plaintiff Hanka, however, did the Federation give them, or any of them, an opportunity for a hearing at which they could state their views and possible objections to the check off of the fair shares of the contributions and to the amounts of the fair share

contributions to be checked off. The Federation treasurer did inform the Education Association's Cooper Senior High School building representative that [7] he would be willing to attend a meeting to explain fair share.

19. The amount of the fair share contributions checked off from plaintiff's earnings was determined and certified by the Federation alone pursuant to Minn. Stat., § 179.65, subd. 2.

20. Neither the Federation's vote to require fair share contributions from the plaintiffs nor the validity of the Federation's calculation of the amount of the fair share contributions has been reviewed by a court or independent, impartial authority or agency.

21. The plaintiffs have not been given an opportunity for a hearing by any independent, fair, and impartial officer, agency or other authority regarding their objections to the check off from their earnings of fair share contributions or the amount of such check-offs.

22. The Federation has rendered no accounting to the fair share payers of the expenses incurred by the Federation in carrying out the Federation's institutional programs, including negotiations and the administration of grievance procedures.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, the Court CONCLUDES AS A MATTER OF LAW:

1. The assessment and check-off of a fair share fee in the manner described in the foregoing Findings of Fact wihtout [sic] prior notice to the plaintiffs, or any of them, and an opportunity for a prior hearing is in violation of due process of law, and therefore, unconstitutional under [8] the Constitution of the State of Minnesota, Article I, section 7.

2. The assessment and check-off of a fair share fee in the manner described in the foregoing Findings of Fact without prior notice to the plaintiffs, or any of them, and an opportunity for a prior hearing is in violation of due process of law and, therefore, unconstitutional under the United States Constitution, Article XIV.

3. That portion of Minnesota Statutes, section 179.65, subdivision 2, which reads:

> "• • • Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative • • •"

violates due process of law in that it makes no provision for notice and hearing prior to the determination of the fair share fee for services and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

4. That portion of Minnesota Statutes, section 179.65, subdivision 2, which reads:

> "• • • Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer [9] upon notification by the exclusive representative of such employee shall be obligated to check off said fee

> from the earnings of the employee and transmit the same to the exclusive representative * * *"

violates due process of law in that it makes no provision for notice and hearing prior to the determination of the fair share fee for services and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, the Court HEREBY MAKES ITS ORDER:

1. Determining and declaring that the assessment and check-off by the defendants of a fair share fee in the manner described in the foregoing Findings of Fact violates due process of law and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

2. Determining and declaring that the assessment and check-off by the defendants of a fair share fee in the manner described in the foregoing Findings of Fact violates due process of law and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

3. Determining and declaring that the portion of Minnesota Statutes, section 179.65, subdivision 2 quoted in Conclusions of Law number 3 violates due process of law and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

[10] 4. Determining and declaring that the portion of Minnesota Statutes, section 179.65, subdivision 2 quoted in Conclusions of Law number 3 violates due process of law and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

BY THE COURT:
Judge of District Court

Dated: August 13, 1975.

MEMORANDUM

By agreement of all parties to this action, the Court is required to determine whether the fair share provisions of the Public Employment Labor Relations Act of 1971 (PELRA), Minn. Stats., § 179.65, subd. 2,[1] pass constitutional muster. For the reasons hereafter given, the undersigned must hold that they do not.

Generally, constitutional issues are met by a court only when ultimately necessary and then with great caution. *Head v. Special School District No. 1*, 288 Minn. 496, 505-506, 182 N.W. 2d 887 (1970). That precept, if literally followed in this case, might seem to indicate that the constitutional issue here considered should be deferred until all other issues of fact and law have been fully litigated and resolved in a process which could require months to complete even if it were accelerated. Another course, however, has been followed here for reasons which seem to

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[1] Minn. Stats., § 179.65, subd. 2 provides:

"Subd. 2. Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

the undersigned to be both compellingly practical and in the public interest.

Counsel for all parties have informed the undersigned that the instant case is but one of a large [2] number of similar suits raising the same or similar questions which either have been or are about to be commenced throughout the state. This litigation involves in the aggregate large sums of money which has or will be withheld from salary payments to public employees. Thus, there exists a pressing present need for prompt determination of the constitutionality of the statute pursuant to which the wages and salaries are withheld. To facilitate a speedy resolution of the problem, counsel for the plaintiff Education Association and defendant Federation have cooperated in presenting the necessary facts to the Court by means of comprehensive requests for admissions dated June 12, 1975. Those requests propounded by counsel for the Education Association and accepted by counsel for the Federation do provide a sufficient factual basis for the undersigned to reach the ultimate constitutional issue without the necessity of further litigation.[2]

In considering the issues, the undersigned has had the benefit of extensive material provided by counsel in oral argument and written memoranda.[3]

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[2] Since the controlling admitted facts are summarized in the accompanying order, they are not repeated here. The issue has been presented, briefed, and argued in accordance with the order of the Chief Judge, the Honorable Douglas K. Amdahl, dated May 13, 1975.

Because the controlling factual issues are no longer disputed, the attached order does not seem to be at variance with the earlier order of the Honorable Andrew W. Danielson dated February 27, 1975 denying the plaintiff's motion for summary judgment and a permanent injunction.

[3] The writer was also given a copy of an excellent article on the subject written by Eric J. Magnuson, a student at William Mitchell

[3] That material has been helpful in understanding the parties' different positions with respect to the fair share provisions of PELRA.

The fair share law, Minn. Stats., § 179.65, subd. 2, is simple in concept and unambiguous in meaning. It provides:

> 1. Public employees shall have the right either to form and join labor or employee organizations and not to do so.
>
> 2. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative to negotiate grievance procedures and the terms and conditions of employment for employees with the employer of such unit.
>
> 3. All public employees who are not members of the exclusive representative may be required by that exclusive representative to contribute a fair share fee for services rendered by it.
>
> 4. Upon notification by the exclusive representative of such employees, the employer shall be obligated to check off the fair share fee from the earnings of the employer and transmit the same to the exclusive representative.
>
> 5. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the exclusive representative relating to negotiations and administration of grievance procedures.

College of Law, entitled NOTE: THE MINNESOTA FAIR SHARE LAW: WHEN A FAIR SHARE IS NOT A FAIR SHARE. Counsel for both the Education Association and the Federation were informed of that fact and have, the writer is informed, also read Mr. Magnuson's Note.

[4] The fair share law does not provide, among other things, for

1. The submission to anyone of an itemization of specific expenses which the exclusive representative claims to have been incurred for services rendered in relationship to negotiations and administration of grievance procedures.

2. Notice to employees who are not members of the exclusive representative of the amount of the fair share fee before it was imposed and assessed.[4]

3. An opportunity for the affected employees to be heard by the exclusive representative before determination of the fair share fee.

4. An opportunity for a full, fair, and impartial hearing before an impartial independent body with judicial or quasi judicial authority to determine whether the fair share is truly fair.

As the writer views the issues presently before the Court, the fair share concept is not in dispute. When one receives employment benefits resulting from the efforts and expenditures of others or of an organization with which he or she is not associated, the law is not offended by the idea that the person benefited ought to be required to contribute a fair share toward the expense of obtaining such employment [5] benefits. Particularly is that so when the organization is charged by law with the responsibility of all employees similarly situated occupationally whether belonging to the employee organization or not. So here the dispute revolves not around the concept of fair share. Rather does it center upon the means by which the fair share is determined. The plaintiffs contend, and the Court

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[4] Such notice in fact was given by the Federation to all affected persons who were not members by means of the form letter suggesting they join the Federation.

must agree, that what constituted a fair share for certain employees of Independent School District 281 was fixed without prior notice to affected employees who were not affiliated with the Federation and without affording them an opportunity to be heard in contravened fundamental concepts of procedural due process mandated by both the state[5] and federal constitutions.[6]

Settled Minnesota law long has required strict observance of procedural due process. *Davis v. Board of County Commissioners*, 65 Minn. 310, 67 N.W. 997 (1896);[7] [6] *Juster Bros. Inc. v. Christgau*, 214 Minn. 108, 7 N.W. 2d 501 (1943).[8]

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[5] Minn. Const., Art. I, sec. 7.

[6] U.S. Const., Art. XIV.

[7] In *Davis*, the Court first stated that in proceedings which are judicial in nature and which affect a citizen's property rights, due process of law requires notice to him and an opportunity to be heard. The court then held unconstitutional a statute which authorized a county surveyor upon the request of a majority of the resident landowners in any government section in the state to locate permanent corners and subdivisional lines with ten days' notice to all resident landowners in the section of such intention and which further empowered the surveyor to apportion the cost of the work in "as equitable a manner as possible" among all the landowners in the section and then directed the county auditor to assess the cost figures as apportioned as a tax on the property of the affected landowners without any further notice or opportunity to be heard because it deprived the landowners of their property without due process of law.

[8] In *Christgau*, the Supreme Court held that procedural due process requires giving an employer notice and an opportunity to be heard in proceedings by an administrative agency to fix the employer's rate of contribution to the unemployment fund notwithstanding legislatively granted authority to the agency to dispense with notice in instances in which the employer failed to notify the agency of the termination of an employee's employment.

Four recent United States Supreme Court decisions speak to the requirements of procedural due process applicable here. The first chronologically is *Sniadach v. Family Finance Corp.*, 305 U.S. 337 (1969). Under Wisconsin law a suing creditor could cause the clerk of court to issue a prejudgment garnishment summons, which when served on the debtor's employer would result in a portion of wages to be frozen. Short of trial on the merits, the debtor was provided no opportunity to be heard and to tender any defense he might have. That prejudgment garnishment procedure absent notice and a prior hearing was held to violate the fundamental principles of due process.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), replevin statutes of Florida and Pennsylvania allowing prejudgment seizure of goods and chattels without provision for giving the possessor notice and an opportunity to challenge the seizure at any kind of prior hearing were held to cause deprivation of property without due process of law insofar as they denied the possessor of the chattels the right to be heard before the chattels were seized.

[7] The third case is Mitchell v. W. T. Grant Company, 416 U.S. 600 (1974) and holds five to four that a Louisiana statute authorizing prejudgment seizure of a debtor's property sold to him on an installment sale pursuant to a writ of sequestration issued by a municipal court judge upon the creditor's petition and affidavit but without affording the debtor prior notice and an opportunity to be heard does not violate due process concepts. The opinion of the Court indicates that the majority derived comfort from the fact that the distrained chattels were not exclusively the property of the debtor and also from the statutory provision entitling the debtor to an immediate dissolution of the writ unless the creditor either proves the ground upon which the writ was issued or rebonds. *Sniadach* was distinguished on the basis that it involved a prejudgment garnishment of wages. The distinguishing feature in *Fuentes* was found to lie in the issuance of a writ by the court clerk.

Notwithstanding the fear expressed in the minority opinion in *Mitchell* that *Fuentes* had been overruled by the majority after the passage of scarcely two years, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, —— U.S. ——, 95 S. Ct. 719 (1975) seems to mark a turning toward the cause charted by the majorities in *Sniadach* and *Fuentes*.

Although the present stance of constitutional doctrine concerning the minimum requirements of procedural due process as they relate to the taking or sequestration of property in prejudgment proceedings [8] is not wholly free from ambiguity when viewed in a broad perspective, it seems clear that an employee's earnings enjoy a position of special concern. One can fairly conclude that the taking or sequestration of a person's earnings is not constitutionally tolerable absent strict observance of the requirements of prior notice and an opportunity to be heard except in certain extraordinary instances not relevant here. See *Fuentes v. Shevin*, 407 U.S. at 90-92.

Nothing in Minnesota decisional law runs to the contrary. Indeed in *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N.W. 2d 87 (1970), the Minnesota Supreme Court declared Minn. Stat., §§ 571.41, 571.42, and 571.60 unconstitutional insofar as they permitted prejudgment garnishments of money without prior notice on the authority of *Sniadach*.[9]

If due process requires notice and opportunity to be heard as a prerequisite to a judicially sanctioned or ordered

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[9] *In re Petition of Rentzel v. State Dept. of Highways*, 290 Minn. 88, 186 N.W. 2d 521 (1971) held that notice and an opportunity to be heard is not a constitutional prerequisite to administrative suspension of a driver's license under the Safety Responsibility Act, Minn. Stat. c. 170. That result followed in part at least from the court's view that suspension of a driver's license which is characterized as an inconvenience stands on a different footing than withholding the basic necessities of life. See the discussion at 290 Minn. 99-103.

taking of earnings, the reasons for requiring such notice and hearing become even more [9] compelling when the taking is accomplished without judicial sanction and supervision. It is not enough to suggest that a school board may have some kind of duty or obligation to ascertain that the sum to be taken or withheld from an employee's earnings and paid to an organization to which the employee does not belong. Particularly does that seem true when the statute authorizing the taking imposes no such supervisory obligation upon the school board. And were a statute so to require without also providing for prior notice and opportunity for hearing to the affected employees, it would fall short of the minimum procedural due process requirements.[10]

From a consideration of the applicable constitutional principles, the undersigned concludes that due process concepts require notice to be given and an opportunity to be heard afforded to school employees before a fair share fee can be assessed by the exclusive representative and withheld from their earnings. Here no such notice and hearing were provided. Nor did the [10] fair share provision of PELRA require such to be given. The conclusion thus is inescapable that the members of the plaintiff Education Association and the individual plaintiffs were deprived of

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[10] While it is not properly the function of this Court to suggest what statutory provisions relating to fair share legislation would pass the test of due process, the following observations seem not inappropriate. At a minimum, the statute should provide before a fair share fee is fixed for adequate notice to all affected and interested parties, for a hearing before an independent, disinterested and impartial administrative agency having authority to fix a fair share fee, for a full hearing before such agency to all interested persons and parties at which both evidence and argument can be adduced, for an administrative determination of what is a fair share fee based upon full findings of fact and appropriate conclusions of law, and for appropriate review of the administrative order.

money which was their property without due process of law. That taking was unconstitutional as is the statutory provision pursuant to which it was done.

Let this Memorandum be attached to and made a part of the foregoing Order.

C. W.

JUDGMENT OF THE SUPREME COURT OF MINNESOTA FROM WHICH APPELLANTS APPEAL, 14 APRIL 1982

(unreported)

STATE OF MINNESOTA, SUPREME COURT

MARILYN THRELKELD and DANIEL HANKA, *Appellants*,

vs. 81-683

THE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO, *Respondent*,

STATE OF MINNESOTA, intervenor, *Respondent*,

PUBLIC EMPLOYMENT RELATIONS BOARD, intervenor, *Respondent*.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

Dated and signed April 14, 1982

BY THE COURT.

Attest: /s/ John McCarthy, Clerk.
JOHN MCCARTHY

ORDER OF THE SUPREME COURT OF MINNESOTA ON REHEARING, 14 APRIL 1982

(unreported)

STATE OF MINNESOTA
IN SUPREME COURT

MARILYN THRELKELD, ET AL., *Appellants,*

v. 81-683

THE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO, *Respondent,*
STATE OF MINNESOTA, intervenor, *Respondent,*
PUBLIC EMPLOYMENT RELATIONS BOARD, intervenor, *Respondent.*

ORDER

[Filed April 14, 1982]

This court, having considered en banc the petition for rehearing in the above-entitled cause,

IT IS ORDERED that the petition for rehearing be and hereby is denied and stay vacated.

IT IS FURTHER ORDERED that respondents are not allowed attorneys fees on this petition pursuant to Rule 140.

DATED: April 14, 1982.

BY THE COURT

/s/ Glenn E. Kelley
GLENN E. KELLEY, Associate Justice

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, 14 MAY 1982

IN THE SUPREME COURT OF
THE STATE OF MINNESOTA

No. 81-683

MARILYN THRELKELD and DANIEL HANKA, *Appellants*,

vs.

THE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO, *Appellee*,

and

STATE OF MINNESOTA, Intervenor, *Appellee*,

and

PUBLIC EMPLOYMENT RELATIONS BOARD, Intervenor, *Appellee*.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Marilyn Threlkeld and Daniel Hanka, Appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota, entered in this action. The Petition for Re-Hearing was denied, and the Judgment was entered, on April 14, 1982, affirming the judgment of the District Court of Hennepin County, State of Minnesota, upholding the original and amended fair share fee provisions of Minnesota Statutes § 179.65, Subd. 2 against Appellants' assertions the statutes are unconstitutional because they violate the First and Fourteenth Amendments to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1976).

LAW OFFICES OF
DAREL F. SWENSON

By /s/ Darel F. Swenson
DAREL F. SWENSON
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and

/s/ Dr. Edwin Vieira, Jr.
DR. EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, MD 20904
(301) 622-2804

Counsel for Appellants

Done this 13th day of May, 1982.

STATE OF MINNESOTA,

COUNTY OF HENNEPIN, ss.

Leanne Redinius of the City of Eden Prairie, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 14th day of May, 1982, she served the annexed Notice of Appeal to the Supreme Court of the United States on Gregg M. Corwin, the attorney(s) for AFSCME, the Amicus in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Wayzata, Minnesota directed to said attorney(s) at 548 W. Parkdale Plaza Bldg., 1660 S. Hwy. 100, St. Louis Park, MN 55416, the last known address of said attorney(s).

/s/ Leanne Redinius

Subscribed and sworn to before me,
this 14th day of May, 1982.

/s/ Darel F. Swenson
DAREL F. SWENSON

[Notary stamp] Notary Public—Minnesota
Hennepin County

My Commission Expires Nov. 4, 1982

STATE OF MINNESOTA,

COUNTY OF HENNEPIN, ss.

Leanne Redinius of the City of Eden Prairie, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 14th day of May, 1982, she served the annexed Notice of Appeal to the Supreme Court of the United States on Eric Miller, the attorney(s) for Amicus Minnesota Education Association, the Amicus in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Wayzata, Minnesota directed to said attorney(s) at 1700 First National Bank Bldg., St. Paul, MN 55101, the last known address of said attorney(s).

/s/ Leanne Redinius

Subscribed and sworn to before me,
this 14th day of May, 1982.

/s/ Darel F. Swenson
DAREL F. SWENSON

[Notary stamp] Notary Public—Minnesota
Hennepin County

My Commission Expires Nov. 4, 1982

STATE OF MINNESOTA,

COUNTY OF HENNEPIN, ss.

Leanne Redinius of the City of Eden Prairie, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 14th day of May, 1982, she served the annexed Notice of Appeal to the Supreme Court of the United States on Brad P. Engdahl, the attorney(s) for Public Employment Relations Board, the Respondent in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Wayzata, Minnesota directed to said attorney(s) at 515 Transportation Bldg., St. Paul, MN 55155, the last known address of said attorney(s).

/s/ Leanne Redinius

Subscribed and sworn to before me,
this 14th day of May, 1982.

/s/ Darel F. Swenson
DAREL F. SWENSON

[Notary stamp] Notary Public—Minnesota
Hennepin County

My Commission Expires Nov. 4, 1982

STATE OF MINNESOTA,

COUNTY OF HENNEPIN, ss.

Leanne Redinius of the City of Eden Prairie, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 14th day of May, 1982, she served the annexed Notice of Appeal to the Supreme Court of the United States on Roger Peterson, the attorney(s) for Robbinsdale Federation of Teachers, Local 872, the Respondent in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Wayzata, Minnesota directed to said attorney(s) at 700 Title Insurance Bldg., Mpls., MN 55401, the last known address of said attorney(s).

/s/ Leanne Redinius

Subscribed and sworn to before me,
this 14th day of May, 1982.

/s/ Darel F. Swenson
DAREL F. SWENSON

[Notary stamp] Notary Public—Minnesota
Hennepin County

My Commission Expires Nov. 4, 1982

STATE OF MINNESOTA,

COUNTY OF HENNEPIN, ss.

Leanne Redinius of the City of Eden Prairie, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 14th day of May, 1982, she served the annexed Notice of Appeal to the Supreme Court of the United States on Barbara L. Sims, the attorney(s) for State of Minnesota, the Respondent in this action, by mailing to her a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Wayzata, Minnesota directed to said attorney(s) at 1935 W. County Rd. B-2, Roseville, MN 55113, the last known address of said attorney(s).

/s/ Leanne Redinius

Subscribed and sworn to before me,
this 14th day of May, 1982.

/s/ Darel F. Swenson
DAREL F. SWENSON

[Notary stamp] Notary Public—Minnesota
Hennepin County

My Commission Expires Nov. 4, 1982

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> * * * No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

Original "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1973 Session Laws of Minnesota, ch. 635, § 10:

> Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in Section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

Amended "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1976 Session Laws of Minnesota, ch. 102, § 2:

Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to Section 179.71, subd. 2.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached Jurisdictional Statement *and* Appendix on each of the following persons, by depositing said copies in a United States post office, first-class postage prepaid, addressed as indicated below:

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Attorney for Appellants

Done this —— day of July, 1982.

Office - Supreme Court, U.S.
FILED
AUG 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2403

IN THE

Supreme Court of the United States

October Term, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

vs.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEES STATE OF MINNESOTA AND MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

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QUESTION PRESENTED

Is a union required by the First and Fourteenth Amendments to the United States Constitution, prior to collecting a fair share fee from public employees it represents but who are not members of the representative, to prove: 1) the costs incurred in performing specific activities which are related to collective bargaining, contract administration and grievance adjustment and which resulted in actual benefits to dissenting employees; and 2) the propriety of the formula used to calculate the fee?

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IN THE

Supreme Court of the United States

October Term, 1981

81-2403

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

vs.

ROBBINSDALE FEDERATION OF TEACHERS,
LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC
EMPLOYMENT RELATIONS BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEES STATE OF MINNESOTA AND MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Supreme Court of the United States, move to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at 316 N.W.2d 551 (Minn. 1982), and reproduced in the Appendix to Jur. Stat. (A. 5 to A. 7).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable provisions of the First and Fourteenth Amendments to the United States Constitution are set forth by Appellants. (A. 129).

The statutory provisions under constitutional attack are the original and amended versions of Minn. Stat. § 179.65, subd. 2.[2] (State A. 1 to A. 2.)[3]

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[1] Throughout this motion, the abbreviation "Jur. Stat." means the Appellants' Jurisdictional Statement; the abbreviation "A. —" is a reference to the Appendix to the Jurisdictional Statement.

[2] Respectively, Minn. Stat. § 179.65, subd. 2, as enacted in 1973 Session Laws of Minnesota, ch. 635, § 10 and Minn. Stat. § 179.65, subd. 2, as enacted in 1976 Session Laws of Minnesota, ch. 102, § 2.

[3] Throughout this motion, the abbreviation "State A. —" is a reference to the Appendix to the Motion to Dismiss of Appellees State of Minnesota and Public Employment Relations Board.

STATEMENT OF THE CASE

This is an appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of both the original and amended versions of Minn. Stat. § 179.65, subd. 2. That statute permits a union representative of public employees to collect a service, or "fair share," fee from persons within a bargaining unit it represents but who are not members of the union.

Appellants Marilyn Threlkeld, an educational aide, and Daniel Hanka, a teacher, have been members of bargaining units in Independent School District No. 281 represented by Appellee Local 872 of the Robbinsdale Federation of Teachers ("RFT"). As non-members of the RFT, Appellants have been assessed fair share fees.

The Minnesota Public Employment Labor Relations Act ("PELRA") was amended in 1973 to permit the assessment of a fair share fee from employees who were part of a bargaining unit but who were not members of the unit's exclusive representative. Minn. Laws 1973, ch. 635, § 10 amending Minn. Stat. § 179.65, subd. 2 (1972). This original fair share fee provision authorized assessment of a fee "for services rendered by the exclusive representative" in an amount not to exceed "a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to the negotiations and administration of grievance procedures." Pursuant to the statute, the RFT sought to collect fair share fees from Appellants.

In November, 1974, Appellants instituted this action challenging the original fair share fee statute as violative of their rights to procedural due process. On August 13, 1975, the state district court ruled that the statute deprived the Appellants

of property without due process of law. (A. 91 to A. 107.) The Minnesota Supreme Court reversed the district court decision, construing the fair share fee statute to provide certain procedural safeguards which satisfied the requirements of due process. *Robbinsdale Education Association v. Robbinsdale Federation of Teachers Local 872*, 307 Minn. 96, 239 N.W.2d 437, *vacated on other grounds*, 429 U.S. 880 (1976). (A. 73 to A. 87.) Threlkeld and Hanka appealed to this Court.

Prior to a decision on that appeal, the Minnesota Legislature amended the original fair share fee statute. Minn. Laws 1976, ch. 102, § 2. (State A. 1 to A. 2.) The amendment, effective April 1, 1976, established additional procedural and substantive standards.

Procedurally, the amendment provided for "advance written notice" of the fair share fee assessment with the opportunity for the employee to file a challenge to the assessment "within 30 days after the receipt of the written notice." *Id.* Although the filing of a challenge would not delay the deduction of the fee from the earnings of the employee, the fee assessed the challenger would be held in escrow pending a decision on the employee's challenge. *Id.* At the challenge hearing conducted by the Minnesota Bureau of Mediation Services ("BMS"),[4] the burden of proof was placed upon the union to justify the amount of the fee. A challenger dissatisfied with the decision of the BMS was provided the opportunity to appeal the Bureau's decision to the Appellee Public Employment Relations Board ("PERB").[5]

Substantively, the 1976 amendment provided that the

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[4] The 1976 amendment also granted to the BMS the authority to hear and decide all issues in fair share fee challenges. Minn. Laws 1976, ch. 102, § 3.

[5] The 1976 amendment provided the PERB with the authority to hear appeals from the BMS relating to fair share fee challenges. Minn. Laws 1976, ch. 102, § 4.

amount of the fair share fee would be "equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative." Minn. Laws 1976, ch. 102, § 2. (State A. 1 to A. 2.) However, in no event could the fee exceed 85% of the regular membership dues. *Id.*

This Court vacated and remanded the decision of the Minnesota Supreme Court for further consideration in light of the 1976 amendment. *Threlkeld v. Robbinsdale Federation of Teachers*, 429 U.S. 880 (1976). The Minnesota Supreme Court remanded the action to the district court which, while retaining jurisdiction, remanded the action to the BMS for exhaustion of administrative remedies.

The BMS conducted three days of hearings on the challenges to the assessments under the 1973 and 1976 versions of the fair share fee statute. The fair share fee hearings were conducted in accordance with BMS Rule 104(c)(1)-(3) and (5)-(7). 8 MCAR § 2.154(e)(3). (State A. 3 to A. 4.) BMS Rule 104(c) provides that hearings will be conducted by a hearing officer who is required "to inquire fully into the facts in dispute, to call, examine, and cross-examine witnesses and to require the production of documentary or other evidence" as deemed necessary. A party has the right to appear at the hearing in person and to be represented by counsel, to present evidence and testimony, and to submit written arguments if deemed appropriate by the hearing officer. 8 MCAR § 2.104 (c). (State A. 3.)

At the hearing, the RFT introduced testimony and exhibits indicating the basis of the fair share fees assessed the Appellants. (A. 37, 47, 51.) Over two hundred pages of testimony were taken and witnesses included the treasurer of the RFT who had actually computed the fair share fees assessed Appel-

lants.[6] Although no discovery had been taken,[7] Appellants nevertheless had copies of the monthly Treasurer's Reports of the RFT which set forth the income and disbursements of the union and vigorously contested the fee assessments.[8]

On the basis of the substantial record accumulated in the hearings under both the original and amended versions of the fair share fee statute, the BMS concluded, both as to the original and amended versions of the fair share fee statute, that the RFT had met its burden of establishing the appropriate amount of the fair share fees assessed Appellants.[9]

In reaching its decision, the BMS applied the "residuum theory" or "residuum approach." The residuum approach is principally a procedural mechanism which assists the agencies in determining which costs may properly form the basis of an exclusive representative's fair share fee assessment. Under the residuum approach, the exclusive representative presents its case by itemizing the "member-only" benefits. Member-only benefits may include: (1) political expenses unrelated

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[6] Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 34, 79; Transcript of Hearing of 20 November, 1978, Bureau of Mediation Services, at 18-19.

[7] The BMS denied the Appellants' request to pursue broad-ranging discovery against the RFT in part because the Appellants did not raise any specific issues but instead asserted a blanket challenge questioning whether they received *any* benefits from the RFT. The BMS concluded that it was the RFT, not the Appellants, which was the party that was forced to go to the hearing without notice. (A. 59 to A. 60.)

[8] *See* Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 77-78. Indeed, prior to the second hearing regarding the amended version of the fair share fee statute, the RFT provided Appellants with documentation which included all monthly Treasurer's Reports of the RFT for the period April 1976 through October 1978. (A. 35.)

[9] Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 54-55, 68, 78; Transcript of Hearing of 20 November, 1978, Bureau of Mediation Services, at 31-33.

to collective bargaining; (2) benefits, such as insurance and social meetings, which are available only to members of the exclusive representative; and (3) other benefits, such as charitable contributions and scholarships, which are unrelated to collective bargaining.[10] The exclusive representative then subtracts the costs associated with the member-only benefits from its total costs. The remainder, or "residuum," is the basis upon which the fair share fee is assessed.

The fee is calculated by determining the proportion of the costs associated with member-only benefits to total costs of the exclusive representative. The resulting proportion is then applied to the regular membership dues of the exclusive representative to determine the fair share fee amount. For example, if the costs associated with member-only benefits constitute 20% of the representative's total costs, the fair share fee would be 80% of the regular membership dues.[11] After calculating the fee, the exclusive representative must demonstrate the accuracy of the method used to determine the amount of the fee assessed.

A dissenting employee may rebut the representative's showing on the basis of the erroneous inclusion within the residuum of member-only benefits or on the basis of computational errors. The representative may respond to the employee's allegations and retains the ultimate burden of persuasion.

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[10] For example, member-only benefits for which Appellants were not assessed fair share fees included scholarships even though they were available to non-members. Transcript of Hearing, 1 February 1978, Bureau of Mediation Services, at 43.

[11] The amended fair share fee statute provides that if the costs associated with member-only benefits constitute 10% of the representative's total costs, the fair share fee nevertheless would equal only 85% of regular membership dues, because the amended fair share fee statute places a ceiling on the amount of the fair share fee assessment at 85% of dues.

The BMS found that, other than the member-only benefits enumerated by the RFT,[12] the expenditures of the RFT were within the residuum. The BMS concluded that the activities within the residuum "are an integral part of an employee organization and are essential if the employee organization is to provide the numerous services required by law of an exclusive representative." (A. 38, 52.)

Threlkeld and Hanka appealed the BMS decisions to the PERB.[13] At the request of Appellants, the PERB consolidated the two appeals. After briefs and oral argument were presented by the parties, the PERB unanimously affirmed the decisions of the BMS on December 6, 1979. (A. 21 to A. 31.)

The Appellants sought review of the PERB decision in state district court. On May 6, 1981, after full briefing and argument, that court held that the original and amended versions of the fair share fee statute, on their face and as applied, did not violate Appellants' constitutional rights and affirmed the PERB decision.

Appellants appealed the district court's decision to the Minnesota Supreme Court. That court affirmed the judgment of the district court in all respects.

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[12] These member-only benefits included political and ideological expenses, liability insurance available only to RFT members, publications, social expenses, scholarships and charitable expenses. (A. 38, 52.)

[13] The PERB consists of five members appointed by the Governor of the State of Minnesota with the advice and consent of the Senate. Two members are representative of public employees; two are representative of public employers; and one is representative of the public at large.

ARGUMENT

THE DECISION OF THE MINNESOTA SUPREME COURT IS PLAINLY CORRECT AND THE APPELLANTS' ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellants' challenge to the constitutionality of the original and amended versions of the Minnesota fair share fee statute, Minn. Stat. § 179.65, subd. 2, does not raise issues of substantial constitutional dimension. Even if it did, their claims are foreclosed by prior decisions of this Court. Therefore, this appeal does not warrant further briefing and oral argument before this Court and should be dismissed.

Appellants contend that the original and amended versions of the Minnesota fair share fee statute violate the First and Fourteenth Amendments to the United States Constitution. Specifically, Appellants argue that, as a matter of constitutional law, an exclusive representative of public employees must, prior to assessing fair share fees on employees represented by but not members of the exclusive representative, prove:

1. The "specific activities" the representative performed negotiating under the Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. §§ 179.61 *et seq.*;

2. The activities which may be constitutionally assessed dissenting employees under this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977);

3. The actual benefits a dissenting employee received from the activities which the representative may constitutionally apportion among all employees it represents;

4. The monetary costs the representative incurred in performing the activities that "demonstrably benefitted" dissenting employees; and

5. The formula for properly distributing the monetary costs among all employees represented by the exclusive representative.

Jur. Stat. at i-ii.

This Court's decisions make clear that the proof requirements Appellants seek to impose upon unions assessing a service fee are not mandated by the First Amendment. Moreover, this Court's decisions also make clear that a hearing prior to deduction of the service fee from wages is not required by the Fourteenth Amendment.

I. PRIOR DECISIONS OF THIS COURT ESTABLISH THAT THE ORIGINAL AND AMENDED VERSIONS OF THE MINNESOTA FAIR SHARE FEE STATUTE COMPLY WITH THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING A UNION TO EXCLUDE FROM FEES ASSESSED NON-MEMBERS COSTS OF BENEFITS AVAILABLE ONLY TO MEMBERS OF THE UNION.

Appellants contend that the First Amendment of the United States Constitution requires a union to meet burdensome proof requirements as a prerequisite to assessing a fair share fee. The union is said to be required to prove the specific activities it performed under PELRA, the benefits which specifically accrued to the dissenting employee, the costs the union incurred in providing the benefits, and the formula the union used to determine the assessed fee. Jur. Stat. at i-ii. Appellants allege that the original and amended versions of the Minnesota fair

share fee statute, on their face and as applied,[14] fail to meet these onerous proof requirements. Appellants' challenge, however, is precluded by prior decisions of this Court and therefore does not raise a substantial federal question. These prior decisions, *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), *International Association of Machinists (IAM) v. Street*, 367 U.S. 40 (1961), *Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station*

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[14] Despite Appellants' challenge to the constitutionality of both the original and amended versions of the fair share fee statute on their face and as applied, Appellees State of Minnesota and PERB will focus primarily on the validity of the amended fair share fee statute as applied by the BMS, the PERB and the Minnesota courts. Although the statutory constructions of the administrative agencies and the Minnesota judiciary are clearly justified by the original and amended fair share fee statute, the statute nevertheless could be construed to comport even to Appellants' constitutional objections inasmuch as their objections relate primarily to the proof requirements imposed upon exclusive representatives attempting to assess a fair share fee. If any doubt as to the constitutionality of the Minnesota statute exists, the statute would have to be construed to avoid a finding of unconstitutionality. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Therefore, the facial validity of the original and amended fair share fee statute is apparent.

As to the validity of the original version of the fair share fee statute as applied by the Minnesota agencies and courts, the responses of Appellees State of Minnesota and the PERB are essentially the same as for the amended version of the statute. Where responses to the two versions of the statute diverge, they will be noted and treated separately.

Finally, Appellees State of Minnesota and PERB focus their responses on the amended fair share fee statute as applied because, although purporting to challenge the validity of the original and amended versions of the statute on their face and as applied, Appellants center their attack on the application of the amended statute. Indeed, the State and PERB are hard-pressed to ascertain any argument in the Jurisdictional Statement addressing the facial validity of the original and amended versions of the statute.

Employees (BRAC) v. Allen, 373 U.S. 113 (1963), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), will be addressed in turn.

In *Railway Employes' Department v. Hanson*, this Court held, among other things, that a federal statute authorizing a union shop agreement which required all employees of a railroad, as a condition of their continued employment, to become members of the union within sixty days and thereafter pay dues to maintain that membership did not violate the rights of dissenting employees to freedom of association. This Court observed:

> The financial support required relates . . . to the work of the union in the realm of collective bargaining. No more precise application of the union overhead to individual members seems to us to be necessary.

Id. at 235.

In *IAM v. Street*, 367 U.S. 740 (1961), the trial court found that union dues collected from dissenting employees pursuant to a union shop agreement authorized by federal statute were used "in substantial amounts" to finance campaigns of candidates whom they opposed and to promote political and economic doctrines with which they disagreed. The trial court concluded that this practice violated plaintiffs' rights of freedom of speech and deprived them of their property without due process of law. *Id.* at 744 n.2, 745 n.3 and 746 n.4.

This Court in *Street* did not directly address the constitutional issues decided by the lower court. *Id.* at 750. Instead, the federal statute was construed "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69 (footnote omitted).

As to the appropriate remedies to be afforded a dissenting employee, this Court offered several observations. First, it

emphasized that any remedies should be granted only to employees who have made their objections known to the union:

> [D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.

Id. at 774. Second, the court recognized that any remedy must balance the interest of the dissenting employee with the interests of the union, the government and the public in avoiding "administrative difficulty" and "encroachment on the legitimate activities or necessary functions of the unions." *Id.* Finally, the Court suggested two possible remedies to protect these competing interests. The first remedy would be an injunction against expenditures for political causes opposed by each complaining employee of a sum of monies intended to be spent by the union for political purposes. A second remedy would be restitution to each complaining employee. The amount to be enjoined or refunded to the employee would be the portion of the employee's dues which equalled the proportion of the union's total expenditures on political activities to the union's total budget.[18] *Id.* at 774-75.

In *BRAC v. Allen*, 373 U.S. 113 (1963), this Court held that a dissenting employee is not required "to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." *Id.* at 118. (Emphasis in original; footnote omitted.)

The *Allen* court also made several observations regarding remedies to be offered objecting employees. First, at least in the absence of special circumstances, preliminary or interim relief was not to be afforded dissenting employees until final

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[18] For example, if the union's total expenditures on political activities constituted one-fourth of the union's total budget, then one-fourth of the complaining employee's dues would be refunded.

judgment in their favor was entered. *Id.* at 120. Second, the Court refined the remedial observations made in *Street* by specifying the two substantive determinations required to fashion appropriate relief. These two determinations are: "(1) what expenditures disclosed by the record are political; (2) what percentage of total union expenditures are political expenditures." *Id.* at 121. Third, the Court placed the burden of proving the proportion of political to total union expenditures on the union. However, it recognized:

> Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise and no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities.

Id. at 122. Finally, the Court suggested a practical remedy in which each dissenting employee would obtain a refund, apportioned on the same basis as the formula outlined in *Street*, as well as a reduction of such exactions in the future by the same proportion.[16] *Id.*

Any doubt as to the applicability of the principles of *Hanson*, *Street* and *Allen* to the public sector was resolved by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, public school teachers challenged the validity of the agency shop clause authorized by a Michi-

[16] Recognizing the "difficulties in judicially administered relief," the Court further proposed that its suggested remedial plan could be achieved through an "internal union remedy" which provided "a simple procedure" to make the two-part determination required by the Court. *Id.* at 122-23.

gan statute which permitted an agency shop clause whereby every employee represented by a union, even though not a union member, was required to pay to the union a service charge equal in amount to union dues.

This Court issued a broad decision. First, the constitutionality of exclusive representation in and the applicability of the principles of *Hanson*, *Street* and *Allen* to the public sector were established. *Id.* at 224-32. Second, the Court held that the agency shop provision was constitutionally valid "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26. Finally, the Court agreed with the dissenting teachers' contention that a union is constitutionally prohibited from spending a part of the required service fees to support an ideological cause "unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

In reaching its decision, this Court recognized the need to balance the interest of employees who do not wish to associate with their exclusive representative against the central role the union shop performs in furthering labor peace and stability. The First Amendment interests of dissenting employees were found to be adequately protected by confining union expenditure of service fees to costs which "promote the cause which justified bringing the group together." *Id.* at 223, quoting *IAM v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring). In the public sector, however, many costs which promote the cause of the group "may be properly termed political." *Id.* at 231. The Court resolved this question of whether service fees of dissenting employees could be used to fund political causes *related* to collective bargaining in the affirmative:

> Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs [of dissenting employees] the critical constitutional inquiry.

Id. at 232. Indeed, the touchstone of the constitutional permissibility of the expenditure of service fees was whether those fees were applied to activities related to collective bargaining, contract administration and grievance adjustment. *Id.* Any expenditure of service fees, whether or not political in nature, was permissible if it were related to the promotion of the cause which justified bringing the group together.[17]

The original and amended versions of the Minnesota fair share fee statute, on their face and as applied, afford nonmember employees even greater protections than the constitutional safeguards established by the above-described line of decisions. First, although this Court's decisions permit nonmembers of a union to be assessed 100% of dues if all of the union's costs are related to collective bargaining, the amended Minnesota fair share fee statute limits the fair share fee assessment to 85% of regular membership dues even if the union's expenditures related to collective bargaining exceed 85% of its total costs. Second, even though a union may constitutionally spend funds not germane to its duties as exclusive representative if an employee does not affirmatively make his or her dissent known to the union, the 85% ceiling contained

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[17] This Court in *Abood* also discussed potential remedies for dissenting employees. It again recognized that "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237 (footnote omitted). The Court reiterated the proposed remedial processes and formulas stated in *Street* and *Allen*. *Id.* at 237-41.

in the amended Minnesota fair share fee statute ensures that a non-member employee is refunded at least 15% of regular membership dues even without affirmatively expressing his or her dissent. *IAM v. Street*, 367 U.S. 740, 774 (1961). Third, although this Court has prohibited the use of service fees of dissenting employees for ideological purposes unrelated to the union's role as exclusive representative, the Minnesota statute goes beyond this constitutional standard in protecting the rights of dissenting employees by prohibiting unions from assessing non-members any costs used to provide benefits available only to union members. Member-only benefits which cannot be assessed dissenting employees include benefits, such as publications and social events, which are available only to union members *even though those benefits may be related to the union's duties as exclusive representative.*[18] In short, the scope of costs which may be assessed dissenting employees under the original and amended versions of the Minnesota fair share fee statute is narrower than that mandated by the United States Constitution.

The original and amended versions of the Minnesota fair share fee statute also are in accord with this Court's guidelines regarding appropriate remedies to be afforded dissenting employees. The Minnesota fair share fee statute provides substantial protections to the First Amendment rights of dissenting employees while preserving the exclusive representative's ability to collect fair share fees and thereby promote labor peace and stability. First, in accordance with *BRAC v. Allen*, 373 U.S. 113, 120 (1963), the RFT's dissenting employees are not entitled to relief until final judgment in their

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[18] For example, publications distributed by the RFT to inform its members were construed to be member-only benefits because, even though related to the union's duties as exclusive representative, the publications were available only to members.

favor is entered. However, as an additional safeguard to the First Amendment interests of complaining employees, the amended fair share fee statute requires that the fees collected from employees who challenge the assessments will be placed in escrow in order to "avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring).

Second, the residuum approach fully complies with this Court's definition of the substantive inquiry to be pursued to determine the appropriate amount of the agency shop or fair share fee. That inquiry is limited to two determinations: (1) what expenditures are unrelated to the union's duties as exclusive bargaining representative; and (2) what percentage of total union expenditures is unrelated to its duties as exclusive bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40 (1977); *BRAC v. Allen*, 373 U.S. 113, 121 (1963). The residuum approach applied by the Minnesota agencies and courts requires the union to establish its member-only benefits[19] and the percentage of the total union budget which is devoted to member-only benefits. The calculation of the fair share fee is then determined, as suggested by this Court, by reducing the fee by the same proportion that expenditures for member-only benefits bear to the total budget of the exclusive representative. *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

Finally, as required by this Court, the Minnesota fair share fee statute places the burden of establishing the appropriate amount of the service fee on the exclusive representative.

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[19] As noted above, the category of member-only benefits is even broader than activities unrelated to the union's duties as exclusive representative.

Abood v. Detroit Board of Education, 431 U.S. 209, 239 n.40 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

Despite this clear precedent, the Appellants attempt to fabricate several constitutional issues which are groundless in both fact and law. Appellants argue that, as a matter of constitutional law, a union must prove the costs incurred in performing specific activities which may be constitutionally assessed under *Abood* and which resulted in actual benefits to dissenting employees. Appellants further argue that the union must prove the formula used to calculate the fee. Jur. Stat. at i-ii. The constitutional requirements the Appellants seek to impose are foreclosed by prior decisions of this Court.

Appellants' principal premise is that a union must establish the actual benefits accruing to each dissenting employee. Such a requirement would impose such an onerous administrative and evidentiary burden on the union as to destroy its ability to collect the fair share fee. This Court has always been mindful of the need to protect the union from administrative burdens which would frustrate the legislative labor policies the fair share fee statute supports. *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963); *IAM v. Street*, 367 U.S. 740, 774 (1961). Thus, this Court, far from requiring an exclusive representative to establish each specific activity which renders an actual benefit to each dissenting employee, has instead referred to the "benefits of union representation that necessarily accrue to all employees." *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977), citing *IAM v. Street*, 367 U.S. 740, 761 (1961), *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415 (1976), and *NLRB v. General Motors*, 373 U.S. 734, 740-41 (1963). Moreover, to require an exclusive representative to establish demonstrable benefits accruing to dissenting employees would permit those employees to transform the proce-

dure for determining the appropriate amount of the fair share fee into a forum to question the wisdom and strategy of union expenditures contrary to this Court's determinations in *Abood* and *Street.*[20] *Abood v. Detroit Board of Education*, 431 U.S. 209, 222-23 (1977); *IAM v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring). In sum, Appellants' contention that the union must establish actual benefits accruing to dissenting employees prior to assessing a fair share fee is completely foreclosed by prior decisions of this Court.[21]

Appellants further argue that an exclusive representative, prior to assessing a fair share fee, must prove the specific activities it performed meeting and negotiating under PELRA. Jur. Stat. at i. No such proof requirement has been imposed by this Court. Instead, this Court has suggested that only two determinations need be made: (1) what expenditures are unrelated to the union's duties as exclusive representative and (2) what percentage the expenditures unrelated to these duties constitute to total union expenditures. *BRAC v. Allen*, 373 U.S. 113, 121 (1963). *See also Abood v. Detroit Board of Education*, 431 U.S. 209, 238-40 (1977) and *IAM v. Street*, 367 U.S. 740, 774-75 (1961). The residuum approach applied to the

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[20] The absurdity of Appellants' position that demonstrable benefits must accrue to dissenting employees before a fair share fee may be assessed is demonstrated by its practical application. Apparently, under Appellants' theory, if a grievance filed by a dissenting employee is ultimately rejected by an arbitrator or the courts, no demonstrable benefit has accrued to that dissenting employee even though the union may have spent a substantial amount of money earnestly prosecuting the claim. This Court has already determined that a legislative body may constitutionally authorize the assessment of fair share fees for the precise purpose of preventing the "free ridership" which the Appellants' theory necessarily protects. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 221-22 (1977).

[21] *A fortiori*, an itemization of the costs incurred in providing such individualized benefits is also not required. *See* Jur. Stat. at ii.

original and amended versions of the Minnesota fair share fee statute embodies this Court's formula. Under the residuum approach, the sum of expenditures for activities unrelated to collective bargaining and expenditures for benefits available only to union members is determined. Then, the percentage of total union expenditures which member-only benefits compose is calculated. This strict adherence of the residuum approach to the guidelines established by this Court in *Street*, *Allen* and *Abood* utterly negates Appellants' contention that they have a constitutional right to an enumeration of each specific activity their exclusive representative performs under PELRA.[22]

Appellants next contend that the union must prove what formula is proper for distributing the costs of representation among all employees in the bargaining unit. Jur. Stat. at ii. Appellees State of Minnesota and PERB concur that the proper formula must be demonstrated. Even though the amended fair share fee statute clearly provides that fair share fees are to be assessed "in an amount equal to the regular membership dues of the exclusive representative, less the costs of benefits financed through the dues and available only to members of the exclusive representative," the BMS has nevertheless required the exclusive representative to demonstrate the accuracy of the method used to determine the amount of the fee assessed. Minn. Stat. § 179.65, subd. 2 (1980). Appellee RFT made the required showing in this case.[23] Thus, no issue

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[22] *A fortiori*, an exclusive representative is also not required to enumerate each activity which may be constitutionally assessed under Abood v. Detroit Board of Education, 431 U.S. 209 (1977). See Jur. Stat. at ii.

[23] *See* Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 38-49; Transcript of Hearing of 20 November 1978, Bureau of Mediation Services, at 21-33; and Transcript of Hearing of 6 December 1978, Bureau of Mediation Services, at 6-11.

is presented for this Court's consideration regarding any constitutional requirement that the union demonstrate the propriety of the formula it used to distribute the costs of representation among all employees in the bargaining unit.

Appellants' contentions, taken as a whole, are an attempt to constitutionalize onerous proof requirements on the exclusive representative so that its ability to assess the fair share fee is effectively destroyed. This Court has been careful to avoid the dangers in imposing unreasonable burdens on unions' attempts to collect service fees lest the policies underlying union and agency shop arrangements be frustrated. *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963); *IAM v. Street*, 367 U.S. 740, 774 (1961). This Court's concern precludes Appellants' contentions here.

In sum, Appellants fail to raise any issue of sufficient constitutional dimension[24] or merit to warrant further consideration by this Court. Therefore, their appeal should be dismissed.

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[24] Appellants often attempt to challenge the factual findings of the BMS which were affirmed by the PERB, state district court and the Minnesota Supreme Court. See, e.g., Jur. Stat. at 7, 13 n. 54, 19, 21. Appellees vigorously contest Appellants' factual representations. More importantly, however, Appellants' assertions raise merely factual, not constitutional, issues. This Court, absent exceptional circumstances not present here, "does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the state." Portland R. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913). See also Evco v. Jones, 409 U.S. 91, 94 (1972).

II. PRIOR DECISIONS OF THIS COURT SHOW THAT THE ORIGINAL AND AMENDED VERSIONS OF THE MINNESOTA FAIR SHARE FEE STATUTE COMPLY WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PROVIDING AN EMPLOYEE CHALLENGING A FAIR SHARE FEE ASSESSED NON-MEMBERS OF THE UNION AN OPPORTUNITY TO BE HEARD PRIOR TO THE UNION RECEIVING THE FEE.

Appellants argue that the original and amended versions of the Minnesota fair share fee statute violate the Fourteenth Amendment in several respects. First, they assert that the statute creates an irrebuttable presumption Jur. Stat. at 12-14. Appellants next contend that the "method of calculating" the fair share fee impermissibly delegates the power of taxation to private groups. *Id.* at 17-19. Finally, Appellants argue that the Minnesota statute does not provide due process to dissenting employees. None of these allegations raises a substantial constitutional issue.

Appellants contend that the residuum approach applied by the Minnesota agencies and courts creates an irrebuttable presumption that each service, other than member-only benefits, provided by an exclusive representative "specifically relates to negotiations and grievance-adjustment, or that every service so related necessarily benefits each employee." Jur. Stat. at 13 (footnotes omitted). The residuum approach, however, irrebuttably presumes neither that all costs within the residuum specifically relate to a union's duties as exclusive representative nor that those incurred costs necessarily benefit each employee.[25]

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[25] Appellants' contention that the Constitution requires that an exclusive representative demonstrate an actual benefit accruing to each employee has, as established above, no merit under prior decisions of this Court. See Abood v. Detroit Board of Education, 431 U.S. 209, 222 (1977) and IAM v. Street, 367 U.S. 740, 761 (1961).

Any presumption contained in the residuum approach is not irrebuttable.[26] The Appellants admit that they are provided the opportunity to prove additional member-only benefits and to attack the costs attributed by the union to member-only benefits. Jur. Stat. at 14. In sum, even if the residuum approach is construed to embody a presumption, that presumption is clearly not irrebuttable.[27]

Appellants' second contention under the Fourteenth Amendment is that the Minnesota fair share fee statute has impermissibly delegated the power of taxation to private groups. Jur. Stat. at 17-19. Appellants' argument utterly ignores the common-sense definition of a tax as an assessment imposed by government to obtain revenue for its operation. It is well-settled that:

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.

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[26] To the extent the residuum approach may be construed to embody a presumption that costs within the residuum are related to collective bargaining, that presumption reflects a reasonable legislative judgment that a union exists for the very purposes of collective bargaining, contract administration and grievance adjustment and, after member-only benefits are removed, the residuum reflects the costs the union incurs in fulfilling its purposes. This Court has stated that it is not within its province to question the wisdom of that judgment. Abood v . Detroit Board of Education, 431 U.S. 209, 224-25, 229 (1977); Railway Employes' Department v. Hanson, 351 U.S. 225, 233-34 (1956).

[27] Indeed, it would appear that the only irrebuttable presumptions contained in the Minnesota fair share fee system are that a union never expends greater than 85% of its funds on services related to its duties as exclusive representative and that every employee who is not a member of the union objects to at least 15% of the union's expenditures which are unrelated to collective bargaining.

United States v. Butler, 297 U.S. 1, 61 (1936). The fair share fee is neither imposed by the State of Minnesota nor does it raise revenue for the State's operation. Thus, this case presents no constitutional issue for this Court's consideration regarding the delegation of the State's power of taxation.

Finally, Appellants assert that the Minnesota fair share fee statute does not comply with procedural due process standards because it does not require a hearing *prior* to the deduction of the fair share fee from a dissenting employee's wages. Jur. Stat. at 19-22. Once again, Appellants fail to present a substantial constitutional question for this Court's consideration.

Appellants' procedural due process claims are foreclosed by this Court's decision in *BRAC v. Allen*, 373 U.S. 113 (1963). In *Allen*, the Court reversed a decree granting dissenting employees interim relief from compliance with financial obligations imposed by a collective bargaining agreement. *Id.* at 120. The Court stated:

> We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.* Therefore, on remand respondents should be given a reasonable time within which *they must pay to the bargaining representative* of their class or craft *all sums required under the Agreement, including arrears, that are owing*; as to any respondent failing to do this, the action must be dismissed.

Id. In short, this Court has concluded that the interest of industrial peace furthered by ensuring adequate financial support for employee representatives outweighs the interest of

dissenting employees to withhold payment of their fair share fees.

The correctness of the *Allen* decision is clearly established by later decisions of this Court. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court observed that due process "is flexible and calls for such procedural protections as a particular situation demands." *Id.* at 334. In determining when and what process is due, three factors are considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The private interest affected by the deduction of a fair share fee prior to a hearing is minimal. The monetary amount of the fee assessment is small.[28] Given that *some* amount of the fee is certainly proper, any potential wrongful deprivation is only a fraction of this small amount. Moreover, if the assessment is determined to be incorrect, the dissenting employee will be deprived of this minimal monetary amount only temporarily. In the interim, fees deducted are placed in escrow so that the challenger's funds will not "be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring).

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[28] For example, Appellant Threlkeld was never assessed more than $4.00 per month for only ten months per year. (A. 24.)

The risk of an erroneous deprivation of the small fee amount is slight. The Minnesota Legislature has determined that public employees represented by a union may be assessed a fair share fee. The Legislature has further determined that this fee may never exceed 85 percent of the union's regular membership dues. Given that the member-only benefits normally do not exceed fifteen percent of dues, the risk that an employee will be erroneously deprived of the fee is not substantial.

A pre-deduction hearing would offer little additional protection to the dissenting employee. The automatic escrow of challenged assessments protects the dissenting employees' First Amendment interest in withholding the support from ideological activities he or she opposes. Hence, the only advantage of a pre-deduction hearing is the avoidance of a temporary deprivation of a small portion of the fair share fee. The "fiscal and administrative burdens" that the pre-deduction hearing would entail outweigh the employees' minimal interest in a pre-deduction hearing.[29] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The governmental interest in authorizing deduction of fair share fees prior to a hearing is substantial. This Court has recognized the governmental interest in ensuring that unions receive funds from members and non-members sufficient to carry out their legal duties:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in set-

---

[29] These burdens would be particularly onerous in that Appellants insist that a judge conduct this preliminary review. Jur. Stat. at 20. Such a requirement is directly contrary to this Court's desire to avoid judicial entanglement in this remedial process. *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

> tling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . ., union and nonunion," within the relevant unit.

Abood v. Detroit Board of Education, 431 U.S. 209, 221 (1977) (citations omitted). Failure to permit deduction of fair share fees pending the determination of the appropriate amount of the assessment would impair the union's ability to collect an assessment that is deemed proper.[30] The union's inability to obtain fees properly due it could undermine the state's interest in promoting the financial stability of exclusive representatives so that they may adequately perform their statutory duties. *See, e.g.*, Minn. Stat. §§ 179.61(2) and (3); 179.63, subds. 5, 16 and 18; 179.65, subd. 4; and 179.68, subd. 3(3) (1980).

In sum, Appellants' contentions are insufficient to raise a substantial constitutional question. The original and amended versions of the Minnesota fair share fee statute, on their face and as applied, do not create any irrebuttable presumptions, do not delegate the State's power of taxation to private groups, and do not deny dissenting employees' rights to procedural due process.

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[30] For example, the challengers may have left their employment or moved out of the area.

CONCLUSION

For the reasons stated herein, the appeal should be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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APPENDIX

Original "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1973 Session Laws of Minnesota, ch. 635, § 10:

Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in Section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

Amended "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1976 Session Laws of Minnesota, ch. 102, § 2:

Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate

an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to Section 179.71, subd. 2.

8 MCAR § 2.104 Investigation and Hearings on a Petition for Determination of Appropriate Unit.

* * * * *

(c) Hearing on Petition for Determination of Appropriate Unit. The hearing shall be conducted by a hearing officer with a reporter making a stenographic record of the proceeding. The hearing will be conducted as follows:

(1) All hearings shall be public meetings except when otherwise provided by the Director.

(2) It shall be the duty of the hearing officer to inquire fully into the facts in dispute, to call, examine, and cross-examine witnesses and to require the production of documentary or other evidence as he may deem necessary to fully acquaint himself with all facts relating to the case.

(3) Any party shall have the right to appear at the hearing in person or be represented by an agent to present pertinent evidence and testimony that is competent, relevant and material to the issues.

(4) The public employer shall provide the names and job classifications of employees within the suggested appropriate unit and make available such information to all parties submitting a 30% showing of interest.

(5) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a statement of the grounds of such objection and included in the stenographic record of the hearing. No objection shall be deemed waived by further participation in the hearing.

(6) The hearing officer may adjourn the hearing from day to day or from time to time and from place to place as he may deem proper upon appropriate notice thereof to the parties to the proceeding.

(7) At the close of the hearing, the hearing officer, may allow the parties to submit written arguments. The hearing officer shall fix the time for the filing of the arguments.

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8 MCAR § 2.154 Challenge of a Fair Share Fee Assessment.

(a) A petition asserting a challenge to a fair share fee assessment by an employee(s) or person(s) aggrieved by the assessment shall be filed in person or by certified mail with the Director. Such petition shall be in writing in the form prescribed and obtainable from the Bureau.

* * * * *

(e) Upon receipt of such a petition the Director shall investigate to determine if sufficient evidence on or concerning the question of the circumstances or the amount of the fair share fee assessment exists. If the Director determines that sufficient evidence exists:

* * * * *

(3) he shall conduct a hearing in accordance with BMS 104(c), (1)-(3) and (5)-(7). Hearings may be combined as deemed appropriate and notice of any such hearings will be served on the challenger(s), the exclusive representative and the employer.

(f) The Director shall decide the issues in a fair share fee challenge hearing on the basis of the record in accordance with BMS 104(d), but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The decision and order shall be issued to the parties and take effect 10 days after issuance unless appealed to the Board.

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No. 81-2403

IN THE

Supreme Court of the United States

October Term, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

vs.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM OF APPELLEE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO

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QUESTION PRESENTED

Does M.S.A. §179.65 Subd. 2 violate the provisions of the First and Fourteenth Amendments to the United States Constitution by allowing a union to collect a fair share fee from non-union unit members based on the union dues paid by its members less all members-only benefits, which in this case included all political and ideological expenses unrelated to collective bargaining, all specific benefits available only to members and all charitable activities, or 15% of members dues whichever is greater.

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IN THE

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MARILYN THRELKELD and DANIEL HANKA,
Appellants,

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ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

ON APPEAL FROM THE SUPKEME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM OF APPELLEE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO

I.

STATEMENT OF THE CASE

Both the pre-amendment and post-amendment "fair share fee" statutes require non-union unit members to pay

the exclusive bargaining representative a fee allocating the costs of their representation. The pre-amendment statute allowed a fee equal to ". . . a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." See J.S. App. 130a. In its initial decision in this case, the Minnesota Supreme Court recognized that the fair share statute was designed "to promote orderly and constructive relationships between all public employees and their employers . . .," by permitting the selection of an exclusive bargaining representative, and by requiring all of the employees who are represented to pay a fair share of the costs of that representative. *Robbinsdale Education Association v. Robbinsdale Federation of Teachers, Local 872*, 307 Minn. 96, 239 N.W.2d 437, 439 (1976). Applying the normal presumption of the constitutionality of a legislative enactment, 239 N.W.2d at 440, that Court construed the Act as affording a right to District Court review of the amount of the assessment, and to an appropriate escrow arrangement for the disputed fees pending a determination in the action. As so construed, the Minnesota Court held that the statute met the requirements of procedural due process. That Court specifically rejected the contention that due process of law required a hearing prior to the deduction of the fee from their wages. 239 N.W.2d at 444.

When the amendment became effective on April 1, 1976, the pre-amendment statute and case became moot. This Court recognized that fact and, on October 12, 1976, vacated and remanded Appellants' first appeal dealing with the pre-amendment statute, stating that "further consideration, in light of Chapter 102 of 1976 Session

Laws of Minnesota" was required. (Chapter 102 contained the post-amendment statute.) 429 U.S. 880 (1976).

The post-amendment statute allowed a fee ". . . equal to regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues" (M.S.A. §179.65, Subd. 2). In addition, the post-amendment statute adopted specific requirements designed to ensure due process. "Advance written notice of the amount of the fair share fee assessment to . . . all employees within the unit" was required. A challenge was allowed, if instituted within thirty days. Challenges were to be adjudicated by the Bureau of Mediation Services (BMS) (M.S.A. §179.71, Subd. 2), with review by the Public Employment Relations Board (PERB) (M.S.A. §179.72, Subd. 3), and later by the Courts. During the challenge procedure all challenged fees "shall be held in escrow by the employer pending a decision by the director pursuant to Section 179.71, Subd. 2." In fact, the challenged fees of Appellants remain in escrow to this date, and will remain in escrow pending this Court's determination.

The "members-only benefits" language of the Minnesota statute has been construed as including political and ideological activities unrelated to collective bargaining, as well as the cost of direct benefits not available to nonmembers. In other words, no amounts assessed to nonmembers may include any costs of political and ideological activities or costs of benefits that are available only to members. Janice L. Lemmers, AFSCME Council 6, Local 694 and State of Minnesota, Bureau of Mediation Services

case No. 89-FSC-607-A, April 30, 1982, p. 3.[1] And by virtue of the statutory escrow procedure, there is no risk than an objector's funds will be used for any purpose pending a determination of the challenge.

After proceedings before the appropriate administrative agencies and the State Courts, the Minnesota Supreme Court ruled:

> In *Robbinsdale Education Association,* we held that the financial stability of exclusive representatives was of such importance as to override the need to determine the "fair share" fee's validity *prior* to its imposition. We likewise there indicated that nonbargaining unit members [3] had certain remedies to protect their rights. Finally, we invited the attention of the legislature to the question of providing a resolution of the problem. Since that decision was "vacated" by the United States Supreme Court, it presently is without force or effect. *In re Estate of Hallbom,* 189 Minn. 383, 249 N.W. 417 (1933).
>
> We have now reviewed our prior opinion in *Robbinsdale Education Association.* We herewith reinstate it with respect to this case as it existed prior to the 1976 amendment. Moreover, we have concluded the amended statute affords to appellants substantial first and fourteenth amendment rights that the original statute did not. Accordingly, we affirm the trial court. 316 N.W.2d 551 (Minn. 1982) (J.S. App. 6a-7a.)

The amount of money involved in the instant case is de minimus. Presuming that some fee must be paid each

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[1]In this case, the exclusive representative excluded from its assessment of the fair share fee expenditures the costs of: all political and ideological activities unrelated to collective bargaining; specific benefits available only to members; and all charitable activities.

year, *Abood*, infra, Appellants cannot hope to gain more than a few dollars per year, if they prevail.

Appellants have challenged the constitutionality of these statutes under the First and Fourteenth Amendments to the United States Constitution. They allege that use of the "residuum theory" foreclosed them from showing that expenses assessed fell outside the scope of allowable fees. In so doing, their essential complaint is that Appellee RFT did not meet the burden of proving that it is entitled to the fees collected. Whether the RFT proved its case is a factual rather than a legal issue. That question most certainly does not contain issues of Constitutional significance.

It is Appellee RFT's position that Appellants' Jurisdictional Statement does not present a Substantial Federal Question, and must be dismissed, or in the alternative the decision below must be summarily affirmed.

II.

THE INSTANT CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is the position of Appellee RFT that:

1. Four cases decided by this Court have already upheld the validity of similar fees against Constitutional challenge, and, therefore, Appellants' issues have been foreclosed by Court precedent, and do not present Substantial Federal Questions; and

2. That the reasons asserted by Appellants, and their supporting arguments, are without Constitutional significance and do not carry the instant facts beyond the scope of the already de-

cided cases. Therefore, the Court is not being presented with a Substantial Federal Question.

For either or both of the above reasons, the Court should dismiss the case, or summarily affirm the decision below.

A. THE ISSUES PRESENTED ARE FORECLOSED BY THE PREVIOUS DECISIONS OF THE SUPREME COURT AND, THEREFORE, DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

1.

Litigation involving fair share type fees is not new to this Court. Between 1956 and 1976, the Court decided four cases involving fair share type fees.[3] In each case, the Court expressly affirmed this type of fee against Constitutional and/or statutory attack. For purposes of this motion only, the *Abood* case will be examined in detail. The reasons being that *Abood* cites, affirms and discusses the relevant portions of each of the previous three cases, and that, similar to the instant case, *Abood* involves a Constitutional challenge to a statutorily allowed fee in the public sector, a factual pattern not presented in any of the previous three cases. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, a 100% of members' dues fee, negotiated pursuant to statutory authority in the public sector was challenged under the First and Fourteenth Amendments.

The *Abood* Court thoroughly discussed all three of the previous cases, with particular emphasis upon *Hanson* and *Street*.

It concluded that:

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[3]See *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956); *Machinists Association v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158 (1963); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976).

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. . . . [It] might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. . . ." (p. 222).

Under *Abood's* reading of *Street* and *Hanson*, while an individual may disagree with a union's use of funds, or may even claim that such use was of no benefit to him, that person was not privileged to withdraw support as long as the expenditure was made for unit purposes. The *Abood* Court considered whether the public sector employee has greater First Amendment rights than the private sector employee. The Court said simply: "We think he does not." Id. at p. 229. Even the argument that public sector bargaining was inherently political was not found to be persuasive (pp. 228-229).

The Court did say, at p. 232, that "the differences between public-and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Hanson* and *Street* were found to control (p. 232).

Abood upheld the Constitutional validity of a public sector statute providing for an agency fee. To defray the costs of representation when objection is made, certain expenses are to be excluded from the fee. Id. at 234. As long as the union is expending the monies for unit purposes, the individual has no complaint, even if he believes the expenditure will not benefit him. Id. at 225.

2.

This Court has outlined the formula for the determination of a constitutionally proper fair share fee: "The financial support required relates, therefore, to the work of the union in the realm of collective bargaining" (p. 235). *Street* (p. 768), *Allen* (p. 121) and *Abood* (pp. 225-226) all basically ruled that collection was permissible to help "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances..." (p. 768).

Street, Allen and *Abood* each discuss what union expenses may not be charged to an objecting employee. All three agree that political and ideological expenses unrelated to collective bargaining must be eliminated. No other specific deduction has yet been required. In order to overcome the payor's burden to support the union, any further category of deduction must pass the *Hanson* impingment of Constitutional rights test. *Abood,* in interpreting *Street* and *Hanson,* ruled that such fees do affect the payor's Constitutional rights, but that such impingement was Constitutionally permissible. 431 U.S. at 225.

The Minnesota pre-amendment statutory formula complies with the formula set out by this Court. It allowed a fee equal to "a pro rata share of the specific expenses in-

curred for services rendered by the representative in relationship to negotiations and administration of grievance procedures" (M.S.A. §179.65, Subd. 2, pre-April 1, 1976, J.S. App. 129a). This formula matches that determined in *Street, Allen* and *Abood* (this formula was upheld against Constitutional attack by the Minnesota Supreme Court, 307 Minn. 96, 239 N.W.2d 437 (1976).)

The amended statutory formula even more fairly allocates the costs to non-members. A non-member will never be required to pay a fee greater than 85% of members' dues. He/she can challenge the fee assessed at an adversary hearing and there the union bears the burden of proof as to the fee charged. Under *Street, Allen* and *Abood*, to obtain any reduction, a non-member must affirmatively object. But, in Minnesota, the union must presume an objection by eliminating all members-only benefits, or 15% of the fee, whichever is greater. The formula espoused by the amended statute, complete with the availability of a full adversarial challenge upon request, more than fully complies with the formula required by the case law.

3.

As applied to the instant issue raised by Appellants, the above law requires the Court to dismiss Appellants' appeal. Four Supreme Court cases in the last 26 years have consistently ruled that imposition of the Minnesota type fee meets Constitutional requirements under the First, Fifth and Fourteenth Amendments. Those cases involved fees allowed by both State and Federal legislation, and in both the public and private sectors. The formulas prescribed by the case law have all been similar to or less strict than the formulas found in either Minnesota fair

share fee statute In short, the U.S .Supreme Court has already validated the imposition of fair share type fees, under the First and Fourteenth Amendments, which arise in the public sector by virtue of a State statute (see *Abood).* Likewise, the U.S. Supreme Court has already validated the particular formula found in the Minnesota fair share fee statute (see *Abood*). The U.S. Supreme Court has already validated the mechanism used in Minnesota to determine the particular fee to be assessed a non-member, i.e. by determination and subtraction of non-collectible costs (see *Allen).* Finally, the U.S. Supreme Court has already determined that non-union unit members may not object to fees spent for unit purposes related to representation since they have an obligation to share in those expenses (see *Street, supra,* and *Abood, supra*).

B. THE INSTANT ISSUES ARE WITHOUT CONSTITUTIONAL SIGNIFICANCE AND, THEREFORE, DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

1.

The instant case does not present open issues of Constitutional significance. While Appellants have framed their arguments by using Constitutional terms, and by citing Supreme Court opinions, the essence of their argument presents neither new nor significant Constitutional theories. Rather than asserting a coherent argument, Appellants have assembled several unrelated groupings of cases, each grouping presenting a different Constitutional issue. Appellants' attempt to explain how their issues are analogous to the particular grouping of cases cited is not persuasive, as we now show.

2.

a.

Appellants first argue that the statute provides the Union with an irrebutable presumption, citing several cases which hold that irrebutable presumptions were in violation of Constitutional guarantees.

An "irrebutable presumption" is defined in *Black's Law Dictionary*, Fourth Edition, p. 1349, as follows:

> . . . a rule of determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise.

When M.S.A. §179.65, Subd. 2, is judged against the above standard, it is clear that it does not contain an irrebutable presumption. Appellants argue that use of the residuum theory (the substraction of members-only benefits or 15% of members' dues, leaving a residuum of expenses chargeable to the fair share payor) resulted in their being unable to challenge the fee. This is untrue. The statute, on its face, allows the Appellants to challenge the fee assessed. The Appellants, in fact, did challenge the fee at adversary hearings which lasted several days.

At the hearings, before the Budeau of Mediation Services, the Union introduced exhibits that showed its total expenditures, and the amount of the "members-only benefits." February 1, 1978, BMS Hearing, Tr. 36-49; November 20, 1978, BMS Hearings. Tr. 32. Witnesses were produced who were able to answer questions concrening these exhibits. February 1, 1978, BMS Hearing, Tr. 34ff; 97ff; November 20, 1978, BMS Hearing,

Tr. 17ff; December 6, 1978, BMS Hearing, Tr. 20ff. At the request of counsel for Plaintiffs, the Union produced monthly expense summaries showing all the Union's expenditures by category. November 20, 1978, BMS Hearing, Tr. 56, 60-61; December 6, 1978, BMS Hearing, Tr. 2. Nothing was "irrebutable." The objectors were free to explore or to challenge each and every expenditure in those exhibits, but failed to do so. Instead, they stood on their unsound position that no expense, even a collective bargaining expense, can be included unless it is shown to specifically benefit the objector. December 6, 1978, BMS Hearing, Tr. 2-11

The Minnesota Court properly concluded:

> A review of the records made available to this Court indicates that plaintiffs received adequate notice and opportunity to challenge Robbinsdale Federation specification of members-only benefits not to be included in the fair-share fee.***
>
> The record indicates that the administrative agencies correctly found that the Robbinsdale Federation sustained its burden under that theory.
>
> ***
>
> Moreover, a reading of the record indicates that the Federation apparently gave plaintiffs' counsel everything he requested either preceding the hearing or at the time of the hearing. [J.S. App. 16a-17a.]

Insofar as the definition requires that the statute forbid the showing of "any proof that the fact is otherwise,"

M.S.A. §179.65, Subd. 2, does not contain an irrebutable presumption.[5]

b.

Appellants next contend that the fair share fee is a "tax," and that a tax for private benefit is in violation of the Constitution. Appellants appear to argue that any fair share type fee is an unconstitutional tax, and, thus, barred in its entirety. This theory is not new. As shown above, it has been determined that fair share type fees do affect Constitutional rights, but are, nevertheless, Constitutionally valid under the First, Fifth and Fourteenth Amendments (*Hanson* and *Abood*). Once such holdings are recognized, it should make little difference what semantic games Appellants wish to play. The payment of a fair share fee to a union which is required to represent all unit members, and which incurs costs in such representation, is a Constitutionally valid mechanism, whether it be called a "fee" or a "tax."

If Appellants' argument is that, in order to qualify as a fee, some benefit must be shown, then that issue was resolved by *Abood*, which recognized that some unit members will never be satisfied with the union's actions, and will never agree that the union benefits them. When the

[5]Even if the statute contained an irrebutable presumption, that theory would not present a Substanial Federal Question under the instant facts. Subsequent to the line of cases cited by Appellants, the Court decided *Weinberger v. Salfi*, 422 U.S. 749 (1975). Under the social security law, a person may not collect spousal survivor's benefits unless married for nine months before the spouse's death. No evidence may be received to vary this rule. The Court upheld the validity of the statute under an "irrebutable presumption" attack, saying that the classification was rationally related to a legitimate legislative goal (Id. at 769). In so doing, the Court distinguished between a non-contractual government benefit, in *Salfi*, and the fundamental personal liberties in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Stanley v. Illinois*, 405 U.S. 645 (1972), Id. at 771.

union's expenditures relate to employee representation, benefit is presumed. In *Hanson*, the Court noted that in passing the Railway Labor Act:

> Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one. [351 U.S. at 235.]

The *Abood* Court, referring to the "benefits of representation that necessarily accrue to all employees," 431 U.S. at 222, has determined that such a judgment is Constitutional in the context of a state statute governing public employees. No new or substantial Constitutional issue is presented.

Even if this Court had not already so ruled, the Minnesota law plainly meets the Fourteenth Amendment's requirement that the payment be rationally related to a Constitutionally permitted end. Plainly too, there is no substance to Appellant's argument that due process is violated, unless the Union is required to show that each of its expenditures for collective bargaining activity produced a tangible gain for the objecting employee in the sense of making that employee better off than he would have been if the expenditure had not been made. (J.S. App. 11-13, 17-19.)

The fair share statute begins:

> All public employees . . . may be required . . . to contribute a fair share fee for services rendered by the exclusive representative. [M.S.A. §179.65, Subd. 2]

We cannot conceive of a clearer expression of a legislative judgment that it is fair and proper for each bargaining unit member to pay his share of the costs incurred by

his exclusive representative in carrying out its obligation to serve all the members of the unit. The legislature has concluded that the performance of those services is a benefit to all concerned

c.

Finally, Appellants argue that the collection of the fee prior to a hearing violates due process. What Appellants have neglected to show is that the post-amendment statute not only provides for notice of the assessment, and allows a hearing upon a challenge; but it also requires the placement of all challenged monies in an escrow account, pending a decision (M.S.A. §179.65, Subd. 2). The hearing allowed is an adversary hearing, complete with examination and cross-examination of witnesses, and the ability to introduce other evidence. It is held before a neutral party, the Bureau of Mediation Services, a State Agency. These safeguards meet due process standards as stated by this Court.

Procedural due process does not require any particular form of proceedings. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). In *Mathews v. Eldridge*, 424 U.S. 319 (1975), the Court held that due process of law does not require a hearing prior to the termination of Social Security disability benefits payments. The Court rejected the claim that the hearing must necessarily precede the deprivation. Id. at 333. Rather, the Court held that:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

> probable value if any, of additional or substitute procedure safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Id. at 335.]

First, "the private interest" that is affected by the deduction of fair share fees without a prior hearing as to excludable amounts is minimal. The largest of the fair share assessments in this case was approximately $11 per month (November 20, 1978 BMS Hearing. Tr. 21), or less than one percent of the employee's wages. As a fee at some level is surely proper, the potential wrongful deprivation is only a fraction of this amount. By contrast, in *Mathews*, the private interest was the receipt of disability benefits, which could well be the recipient's sole means of support. As a prior hearing was not required in *Mathews*, it surely is not required here.

Second, the risk of an erroneous deprivation is relatively slight. The statute provides that a fair share fee cannot exceed 85% of regular union dues. This reflects a legislative judgment that, in most cases, excludable expenditures will not exceed this amount. As the exclusive representative must be prepared to document its assessment prior to the receipt of the funds, the risk of a significant overcharge is slight. By automatically escrowing disputed funds, there is no "risk that [a dissenter's] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, at 244 (Stevens, J., concurring). The only additional advantage of a pre-deduction hearing is to avoid an erroneous temporary deprivation to the employee of a small portion of the fair share fee.

Third, the State's interest in authorizing deductions prior to a hearing is substantial. *Abood* and its predecessors recognized the substantial governmental interest in promoting the financial stability of exclusive representatives by allowing the assessment of fees from all persons to whom it is obligated to provide representational services. See *Abood*, at 221-222.

A failure to deduct fair share fees, pending the resolution of a challenge, would place in jeopardy the ability of the Union to collect an assessment that is sustained, either because the protestor may leave his employment, or because the fees accrued over a period of time may total a substantial amount. Loss of these fees, covering periods in which the representative is obligated to represent all employees, could undermine the basic statutory policy. (See *Allen*). The only workable procedure is one which assures that whoever wins the dispute will receive the money. This is accomplished by the Minnesota statute.

III.

CONCLUSION

Appellants must do more than cite cases which have been decided to contain Constitutional violations. There must be some showing how those cases control the instant case, and how the instant case involves significant Constitutional issues. As shown, the Court has ruled that the fair share type fee is Constitutional. It has allowed exceptions only where they involve Constitutionally significant issues. When Appellants raise new issues or Constitutionally significant issues, they may be granted an argument. To date, they have not raised such issues. The Supreme Court has decided the fundamental issues in *Abood*. It

should not be asked to expend its time reviewing other procedures promulgated by State Legislatures regarding public employees which have been reviewed and upheld by the State Supreme Court with the benefit of the principles announced in *Abood*. The Court should dismiss this case or summarily affirm the decision below.

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No. 81-2403

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Appellees.

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INTRODUCTION

Pursuant to Rule 16.5 of the Rules of this Court, Appellants Marilyn Threlkeld and Daniel Hanka file this brief in reply to the motion to dismiss of Appellees State of Minnesota and Minnesota Public Employment Relations Board.

ARGUMENT

Appellees contend that the issues Appellants raise are not "of sufficient constitutional dimension or merit to warrant * * * consideration by this Court"[1] because:

> (i) "the amended Minnesota fair share fee statute limits the * * * assessment to 85% of regular membership dues even if the union's expenditures related to collective bargaining exceed 85% of its total costs";[2]
>
> (ii) "the Minnesota statute goes beyond [the] constitutional standard in protecting the rights of dissenting employees by prohibiting unions from assessing nonmembers any costs used to provide [collective-bargaining] benefits available only to union members";[3]
>
> (iii) "the residuum approach fully complies with this Court's definition of the substantive inquiry to be pursued to determine the appropriate amount of the * * * fair share fee";[4]
>
> (iv) * * * "the statute places the burden of establishing the appropriate amount of the service fee on the exclusive representative";[5]

---

[1] Motion to Dismiss of Appellees State of Minnesota and Minnesota Public Employment Relations Board (M.) at 22 (footnote omitted).

[2] *Id.* at 16.

[3] *Id.* at 17.

[4] *Id.* at 18.

[5] *Id.*

(v) the "residuum theory" involves no irrebuttable presumption;[6] and

(vi) the statute does not delegate exclusive representatives a power of "private taxation".[7]

None of these claims can withstand analysis.

First, that the "statute limits the * * * fee assessment to 85% of regular membership dues" is irrelevant here, where Appellant Robbinsdale Federation of Teachers (RFT) did not establish that *any* percentage of its expenditures defrayed the costs of legitimate collective-bargaining activities.[8]

Second, that the statute precludes the RFT from assessing "members-only benefits" against Appellants, even though such benefits might relate to its duties as exclusive representative, is also irrelevant. The Constitution permits the RFT to impose fees solely for those services that Appellants themselves actually receive; it precludes any charges to finance benefits that accrue uniquely to others, whether or not those benefits relate to collective bargaining. Moreover, focussing on "members-only benefits" begs the basic issue: namely, "What

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[6] *Id.* at 23-24.

[7] *Id.* at 24-25.

[8] Indeed, the "limitation" is never relevant to dissenting employees. If the "fair-share fee" contains *any* assessment for costs that are not collective-bargaining in nature, it violates the employees' constitutional liberties, notwithstanding that it may be "only" 85% of the representative's regular membership-dues. The size of the dues, after all, has no independent constitutional significance, and certainly gains none by being multiplied by an arbitrary statutory percentage.

specific *collective-bargaining* services did the RFT provide Appellants?" That the RFT may have performed a service for all members of its bargaining-unit, Appellants included, does not logically imply that that service properly related to "collective-bargaining, contract administration, and grievance adjustment".[9] Only by identifying and examining each alleged service can an agency or court rationally determine the existence *vel non* of the constitutionally necessary relationship.

Third, this Court has never adopted, sanctioned, or even suggested the "residuum theory" as the standard for the "substantive inquiry" in agency-fee cases. To be sure, if the RFT had identified *all* of its activities *A, B, C, . . . , Z*; and had shown with clear and convincing evidence that activities *D, E, F, . . . , Z* were collective-bargaining in nature—then (and only then) it could have calculated the "fair-share fee" *either* by subtracting the costs of *A, B,* and *C* from its total expenditures and dividing the remainder by the number of employees in the unit,[10] *or* by adding the costs of *D, E, F, . . .* , and *Z* and performing the division. However, where (as here) the RFT identified *only* activities *A, B,* and *C,* any further calculation was logically impermissible. Appellees misrepresent the situation when they claim that, "[u]nder the residuum approach, the sum of expenditures for activities unrelated to collective bargaining and expenditures for benefits available only to union members is deter-

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[9] This, and this alone, is the applicable standard under Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26 (1977) (opinion of Stewart, J.).

[10] *See* M. at 18.

mined".[11] The "residuum approach" *might* derive the total costs of "members-only benefits" *if* the representative honestly disclosed all such costs to employees unable to establish the truth of the matter themselves through discovery. However, except in the unlikely circumstance (not proven here) that spending on "members-only benefits" by happenstance includes all "expenditures for activities unrelated to collective bargaining", the "residuum approach" can never derive the latter, because it licenses the representative to collect a fee without disclosing any of its activities other than "members-only benefits", their relation to collective bargaining, or their cost.[12]

Fourth, that the statute imposes a "burden" on the representative to show its expenditures for "members-

---

[11] *Id.* at 21.

[12] Appellees claim this Court has held that, where dissenting employees object to a representative's expenditure of agency fees on political activism, a proper approach is to determine the amount of the representative's political expenditures, and thereafter reduce the fees by this amount, permitting the representative to retain the remainder. *Id.* at 17-21. Such a procedure might be acceptable where the employees objected only to political expenditures, and had access to judicially supervised discovery, as they did in all the cases Appellees cite. In practice, however, it still would not amount to the "residuum theory" Minnesota has adopted. To be sure, all expenditures the representative itself labelled "political" would be excludable from the fee, without any further inquiry. But surely undefined activities the representative arbitrarily lumped within amorphous, non-descriptive categories such as "salaries", "administrative costs", "contingency funds", and so on would not be free from scrutiny to determine if they actually involved "political" matters. Admitting *some* "political" spending would not entitle the representative to a conclusive presumption that all its other, *unspecified* costs were necessarily "non-political" in nature.

only benefits" is irrelevant, even if it were true, which it is not in this case.[13] A "burden of proof" is significant only if the facts proved are material. Proof of "members-only benefits" does not logically equate with proof of collective-bargaining costs. Therefore, the "burden" of proving the former fails to satisfy the constitutional requirement of proving the latter.

Fifth, on its face the "residuum theory" certainly does embody an irrebuttable presumption that every activity of the RFT other than provision of "members-only benefits" is a constitutional collective-bargaining service. The amended statute imposes on Appellants a duty to pay "a fair share fee * * * in an amount equal to the regular membership dues of the exclusive representative, less the costs of benefits financed through the dues and available only to members of the * * * representative", up to 85% of those dues.[14] Thus, for a stark example certainly not excluded by the record in this case, if the RFT expended *no* monies on collective bargaining in a particular year, and less than 15% of its income on "members-only benefits", the statute nevertheless would require Appellants to pay fees equal to 85% of dues, and would preclude them from arguing that the fees are illegal under Minnesota law because

---

[13] Testifying on the RFT's "fair-share" exactions under the original statute, its treasurer admitted that the organization's exhibits did not indicate the total expenditures for "members-only benefits", because they failed to reflect the costs of salaries and administrative expenses incurred in providing those benefits. Transcript of Hearing of Wednesday, 1 February 1978, before Hearing Officer Viola M. Kanatz, Minnesota Bureau of Mediation Services, at 81-86.

[14] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2.

they did not finance bargaining activities. In short, by licensing the RFT to extract fees without proof of any relationship to collective-bargaining costs, the statute embodies a conclusive legislative presumption that *any* fee excluding charges for "members-only benefits" is valid.

Sixth and last, as applied here, the statute self-evidently delegates a power of taxation to the RFT, a private group. Minnesota has provided the RFT with a statutory mechanism to compel certain private citizens to pay it fees for alleged services. Therein lies a delegation of power. As a matter of state law, the statute does not require the RFT to establish that the fees recompense it for services "which * * * besto[w] a benefit on the [payers], not shared by other members of society".[15] Therein lies a delegation of the power of taxation.[16]

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[15] National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-42 (1974).

[16] Appellees argue that, because the RFT is not part of the government of Minnesota, a "fair-share fee" cannot be a "tax", by definition. M. at 24-25. Of course, this misses the point. Appellants describe these fees as "taxes" because they have no demonstrated relationship to services Appellants have received from the RFT, yet are exacted under color of law, purportedly in payment for the RFT's statutory activities as exclusive representative. If the Minnesota Legislature permitted a governmental agency to impose such payments, they would be "taxes", strictly so-called, but would be invalid as an unconstitutional delegation of legislative power. Here, where the Legislature permits a private party to impose the payments under aegis of statute, apparently Appellees would have this Court rule: (i) that the payments should be euphemistically labelled "exactions", not "taxes"; and (ii) that the Legislature may allow such private "exactions", even though it may not allow a governmental agency to do exactly the same thing when the pay-

CONCLUSION

This Court should deny Appellees' motion to dismiss, assume jurisdiction, and set this case down for full briefing and oral argument.

Respectfully submitted,

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ments are called "taxes"! Constitutional issues, however, turn on substance, not labels. *E.g.*, City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 174 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 269 & nn.7-12 (1964).

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INTRODUCTION

Pursuant to Rule 16.5 of the Rules of this Court, Appellants Marilyn Threlkeld and Daniel Hanka hereby oppose the motion to dismiss or affirm of Appellee Robbinsdale Federation of Teachers (RFT).

ARGUMENT

The RFT contends that this appeal presents no substantial constitutional question because:

> (i) "[t]he 'members-only benefits' language of the [amended] statute has been construed as including political and ideological activities unrelated to collective bargaining, as well as the cost of direct benefits not available to non-members";[1]
>
> (ii)"[t]he * * * pre-amendment statutory formula complies with the formula set out by this Court", and "[t]he amended statutory formula even more fairly allocates the costs to non-members";[2]
>
> (iii) "[the amended statute] does not contain an irrebutable [*sic*] presumption";[3]
>
> (iv) it is not necessary that "some benefit [to Appellants] must be shown" if a "fair-share" assessment is "to qualify as a fee", rather than be disqualified as a "tax";[4] and
>
> (v) the method of collecting "fair-share fees" meets this Court's standards for procedural due process.[5]

None of these contentions has merit.

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[1] Motion to Dismiss or Affirm of Appellee Robbinsdale Federation of Teachers, Local 872, AFL-CIO (M.) at 3.

[2] *Id.* at 8, 9.

[3] *Id.* at 11.

[4] *Id.* at 13.

[5] *Id.* at 15-17.

First, even if the category "members-only benefits" included "political and ideological activities unrelated to collective bargaining", and even if the category "political and ideological activities unrelated to collective bargaining" included *all* of the RFT's activities not strictly collective-bargaining in nature under this Court's decision in *Abood* v. *Detroit Board of Education*,[6] application of the "fair-share" scheme to Appellants would nevertheless be unconstitutional—because the RFT presented *no evidence whatsoever* that the *unspecified* activities in the "residuum" of its expenditures were *not* "political and ideological activities unrelated to collective bargaining". The RFT identified merely selected activities as "members-only benefits", hiding the rest behind non-descriptive budget-labels, and claiming that this "residuum" was lawfully includable in a "fair-share fee" simply because it said so. By its various "exclusions",[7] the RFT proved only what it was *not* entitled to collect as part of Appellants' "fair-share fees"— it did not establish, logically or constitutionally, that any of the undefined activities in the "residuum" were properly chargeable.

It is ludicrous to argue, as does the RFT, that "[w]hether the RFT proved its case is a factual rather than a legal issue", and therefore "does not contain issues of Constitutional significance".[8] The RFT proved only the "members-only benefits" it deigned to identify. Appellants agree that the costs of those benefits were excluded from their fees. However, from the *factual* proof of selected "members-only benefits", the

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[6] 431 U.S. 209 (1977).

[7] M. at 4 n.1.

[8] *Id.* at 5.

RFT and the Minnesota agencies and courts leaped to the *legal* conclusion that all the RTF's other, unspecified expenditures were collective-bargaining in nature. This conclusion Appellants contest as self-evidently non-rational. And surely, whether a state statute resting upon such a patently illogical premiss can authorize deprivations of liberty and property is a question of substantial constitutional import.

Second, Appellants never argued that the original "fair-share" statute embodied an incorrect formula for calculating fees. For that statute required a showing of *"specific expenses* incurred for *services* rendered by the representative *in relationship to* negotiations and administration of grievance procedures", and then allocated the fees as "a pro rata share" of these proven "expenses".[9] But the RFT and the Minnesota agencies and courts ignored this formula. Instead, they used the invalid "residuum theory", dispensing with any evidence of "specific expenses", "services", or nexus to "negotiations and administration of grievance procedures".

Appellants' complaint—which the RFT never addresses—it that the "residuum theory" is not rational, and therefore cannot allocate costs of collective bargaining at all, let alone "even more fairly" than did the original statutory formula.[10] To say, as does the RFT, that "political and ideological expenses unrelated to collective bargaining must be eliminated" from any "fair-share" assessment, but that "[n]o

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[9] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1973 Session Laws of Minnesota, ch. 635, § 10 (emphasis supplied).

[10] *Pace* M. at 9.

other deduction has yet been required", turns things upside-down.[11] *All* expenditures of public-sector unions are "political and ideological" under *Abood*—and only those *demonstrably collective-bargaining in nature* are constitutionally chargeable to dissenters.[12] Thus, a "fair-share" calculation involves, not *deductions from* a presumably valid amount, but instead *additions to* an initial charge of nothing. The "residuum theory" (unlike the original statute) adopts a deductive, not an additive, approach. Therefore, it is unconstitutional.

Third, the RFT misrepresents what the amended statute allows Appellants to challenge. Appellants certainly can "challenge the fee", as the RFT says.[13] But they are allowed to do this—*without any personal knowledge of the institutional structure and activities of the RFT and its affiliates, and without any discovery of those matters*—only by disproving the costs of the "members-only benefits" the RFT identifies, or by establishing the existence of other such benefits it does not disclose. The statute does not permit them to argue that unidentified expenditures are unrelated to negotiations and grievance-adjustment, or (if so related) are not "services" in a constitutional sense.

The constitutionally relevant matter is the RFT's expenditures on collective bargaining. Yet the amended statute focusses exclusively on the RFT's "members-only benefits", and presumes that all other, unspecified costs are properly chargeable. Appellants cannot chal-

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[11] *Id.* at 8.

[12] *See* 431 U.S. at 227-37 (opinion of Stewart, J.).

[13] M. at 11.

lenge these other, unspecified costs: either practically, because they have no effective means of determining what activities underlay the expenditures; or procedurally, because the Minnesota agencies and courts have ruled that such costs, not defraying "members-only benefits", are includable in the "fair-share fee" by statutory hypothesis. Thus, the amended statute certainly does establish an "irrebuttable presumption", in the sense of "a rule of determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise".[14] The statute says that proof of "members-only benefits" constitutes "the quantity of evidence requisite" to prove the quite different "averment" that a "fair-share fee" includes only the costs of collective bargaining. And the statute does not permit this inverted, illogical proof "to be overcome".

Fourth, Appellants never argued that a "fair-share fee" is invalid simply because they are not personally "satisfied with the union's actions", or do not subjectively "agree that the union benefits them", as the RFT complains.[15] Rather, Appellants say that a "fair-share" assessment can qualify as a "fee", instead of being disqualified as a "tax", only if it demonstrably relates to benefits employees receive from the RFT's services. Certainly, the RFT, a self-interested private organization, enjoys no better position than an administrative agency of the national government where assessment of "fees" is concerned. Yet no one denies that an agency may charge a "fee" (as opposed

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[14] The definition the RFT explicitly adopts. *Id.*

[15] *Id.* at 13.

to collecting a "tax") "only for 'those activities that are specifically identified as * * * benefitting identifiable recipients' ",[16] and are "indeed beneficial" to them.[17] The agency must demonstrate "a sufficient nexus between the * * * service for which the fee is charged and the individuals who are assessed",[18] and show that "the service * * * *primarily* provide[s] special benefits to an identifiable recipient".[19] Absent an identifiable beneficiary, or "when the identification of the ultimate beneficiary is obscure", the agency may charge no fee at all.[20] For, under such circumstances, the assessment will not satisfy the "value-to-the-recipient" standard which distinguishes a valid "fee" from an unconstitutional "tax".[21] Why no benefit can constitutionally be presumed where a governmental agency acts, but "[w]hen the union's expenditures relate to employee representation, benefit is presumed", the RFT does not explain.[22] Indeed, whether such a presumption is even rational is itself a sub-

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[16] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976).

[17] FPC v. New England Power Co., 415 U.S. 345, 351 (1974).

[18] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976).

[19] Public Serv. Co. of Colorado v. Andrus, 433 F. Supp. 144, 152 (D. Colo. 1977).

[20] FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 230 (5th Cir. 1979).

[21] *E.g.*, Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1137 (D.C. Cir. 1976).

[22] M. at 13-14.

stantial constitutional question that this Court should address.[23]

Fifth and last, Appellants agree that procedural-due-process analysis involves weighing private against governmental interests, in light of the risk of an erroneous deprivation of property. Here, however, that weighing supports Appellants' challenge. The RFT claims that "the State's interest in authorizing ['fair-share'] deductions prior to a hearing is substantial", in order to "promot[e] the financial stability of exclusive representatives"[24]—implying that large sums of money are involved. Yet, inconsistently, the RFT admits that "[t]he largest of the fair share assessments in this case was approximately $11 per month".[25] How the State can advance a "substantial interest" in immediate seizures of monies that the ultimate recipient thereof concedes are "minimal" in amount defies rational explanation. Bordering on the ridiculous is the RFT's fantasy that "the protestor may leave his employment" to avoid paying fees that amount to "less than one percent of [his] wages"; and mathematically unlikely is its projection that "the fees accrued over a period of time may total a substantial amount", when (as in this case) they involve only about $132 *per* year.[26]

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[23] On the complex legal-economic issues involved, *see, e.g.*, Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Public Policy* (Am. Enterprise Inst. 1958).

[24] M. at 17.

[25] *Id.* at 16, characterizing Appellants' interest as "minimal".

[26] *Id.* at 16-17.

More important is the risk that application of the "residuum theory" by the Minnesota agencies and courts, followed by payment to the RFT of fees released from escrow, no matter what the amount, will result in the immediate and irreparable use of dissenting employees' monies "to finance ideological activities unrelated to collective bargaining."[27] Indeed, because the "residuum theory" is not rational this risk approaches a certainty.

The RFT claims that immediate "fair-share" deductions, followed by a hearing on their validity, is the "only workable procedure".[28] Appellants do not contend that a "pay-as-you-go" system, requiring accurate projections of its expenditures by the representative before any deductions are made, escrowing of all funds under the supervision of a governmental agency until final determination on the merits, clear and convincing evidence of costs of collective-bargaining services by the representative, and return to dissenting employees with adequate interest of all excess collections in the escrow accounts, might not be both "workable" and procedurally adequate. That is a question for this Court to decide when the Minnesota Legislature adopts such a system. Now, however, the "fair-share" statute contains none of these safeguards. Although "workable", from the RFT's perspective, it is procedurally defective from that of the Fourteenth Amendment.

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[27] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244 (1977) (Stevens, J., concurring); *see* School Comm. v. Greenfield Educ. Ass'n, 385 Mass. 70, —— & n.8, 431 N.E.2d 180, 188-89 & n.8 (1982); *see also* Perry v. City of Fort Wayne, 542 F. Supp. 268, 273-74 (N.D. Ind. 1982).

[28] M. at 17.

CONCLUSION

This Court should deny the RFT's motion to dismiss or affirm, assume jurisdiction, and set this case for full briefing and oral argument.

Respectfully submitted,

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